Supreme Court, U.S.
FILED
MAY 25 1993
OFFICE OF THE CLERK

No. 92-1882

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1992

THE STATE OF TEXAS,
Petitioner,

v.

HAROLD LINDSAY DE FREECE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

1. When an indigent state court criminal defendant is appointed a psychiatric expert under *Ake v. Oklahoma*, 470 U.S. 68 (1985), and the expert concludes that the defendant was sane at the time of the offense and is competent to stand trial, does *Ake* require the appointment of a second expert to function as a member of the defense team?

2. When a psychiatric expert is appointed an indigent state court criminal defendant under *Ake* and the expert ultimately testifies for the state, is *Ake* satisfied where the defendant (1) is provided a copy of the expert's report more than a year prior to trial and (2) has the opportunity to (a) consult extensively with the witness prior to cross-examination and (b) subpoena a psychiatrist whose diagnosis supported the defendant's insanity plea?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Petitioner herein, by and through its attorney, the Attorney General of Texas, and files this Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals granting relief on De Freece's petition for discretionary review, for which review is sought, is reported at *De Freece v. State*, 848 S.W.2d 150 (Tex. Crim. App. 1993), and is attached hereto as Appendix A. The opinion of the state court of appeals

affirming De Freece's conviction is reported at 829 S.W.2d 251 (Tex. App. -- El Paso 1992), and is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on February 24, 1993. This petition for writ of certiorari is filed within 90 days after final judgment. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

Article 46.03 § 3 of the Texas Code of Criminal Procedure provides in pertinent part that:

> (a) If notice of intention to raise the insanity defense is filed under Section 2 of this article, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health and mental retardation to examine the defendant with regard to the insanity defense and to testify thereto at any trial or hearing on this issue.
>
> * * *
>
> (f) When a defendant wishes to be examined by a psychiatrist or other expert of his own choice, the court on timely request shall provide the examiner with reasonable opportunity to examine the defendant.
>
> (g) The experts appointed under this section to examine the defendant with regard to the insanity defense also may be appointed by the court to examine the defendant with regard

> to his competency to stand trial pursuant to Section 3 of Article 46.02 of this code, provided that separate written reports concerning the defendant's competency to stand trial and the insanity defense shall be filed with the court.

STATEMENT OF THE CASE

On March 20, 1989, an indictment was returned in Cause No. 564 in the 63rd District Court of Terrell County, Texas, alleging that on or about February 17, 1989, De Freece committed the first-degree felony offense of murder when he

> did then and there intentionally cause the death of an individual, Juanita Rodriguez, by cutting and stabbing the said Juanita Rodriguez with a knife . . . .

Tr. 2.[1] The state filed a motion to have De Freece examined by a psychiatrist on June 23, 1989, and De Freece gave notice of his intent to plead not guilty by reason of insanity shortly thereafter. Tr. 15-16. On June 26, the trial court ordered that De Freece be delivered to Vernon State Hospital for a psychiatric examination to determine his sanity at the time of the offense as well as his competence to stand trial. Tr. 17-18.

In August 1989, Dr. Fini Heynen of Vernon State Hospital reported to the court that De Freece "appear[ed] to be incompetent at [that] time," but that there was a "substantial probability that he [could] attain competency in the near future with treatment." Tr. 36. She also reported that "[w]ith regard to the question of criminal responsibility, it is my opinion that at the time of the alleged offense, Mr. DeFreece had substantial capacity to appreciate the wrongfulness of his behavior and understood that his behavior was unlawful." Tr. 39. Based on

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[1] "Tr." refers to the transcript of pleadings, orders, reports and correspondence of De Freece's trial, and "R" refers to the record of the testimony of the trial.

these reports, on September 11, 1989, a jury found De Freece incompetent to stand trial. Tr. 48-49. On September 13, the trial court ordered that De Freece be committed to a state mental hospital where his competency to stand trial was to be tested "at least every 90 days." Tr. 56. The court also ordered that it be provided with a report stating either when De Freece would be competent to stand trial, or that there would be "no substantial probability that the Defendant [would] attain the mental competency to stand trial in the foreseeable future." Tr. 56-57.

On December 7, 1989, and March 12, 1990, the court was notified that De Freece was not yet competent to stand trial, Tr. 58, 62, but on June 1, 1990, the court was informed that De Freece had been found competent. Tr. 66. Thereafter, the defense filed its "Motion For Provision of Psychiatric Expert To Assist Defense And For Diagnostic Testing To Prepare Effective Defense." Tr. 71. On August 20, the defense filed its "Announcement of 'Not Ready For Trial,' Exception To The Failure Of The Court To Rule Upon His Pre-Trial Motion, And Suggestion Of Incompetency Of Counsel To Defend Under The Circumstances." *Id.* at 74. At a hearing on September 18, the defense advised the court that it sought the appointment of an expert who "would be a member of the defense team, would be available for helping preparation of the case, preparation for cross-examination, deciding which tests were needed . . . as well as being present during the trial to help the defendant." R III at 3. The court, relying on Fifth Circuit precedent, overruled the defense's motion, stating that a psychiatrist already had been appointed to conduct an evaluation and that it was not necessary to appoint another. *Id.* at 3-4. The court advised the prosecutor that Dr. Heynen, who was from out of town, would be required to spend the night to be available to confer with defense counsel

> because I think it is only right that Mr. Underwood has a chance to consult with her just like you are going to be able to do, because this person is a neutral, detached witness, and so I'm

> going to -- I think Mr. Underwood needs a chance to meet with her to be able to prepare for examination of the witness on behalf of the defense, so I can -- you know, I can help you in that respect. You can't walk into something cold without an opportunity to interview a witness.

Id. at 7. The court also noted that Dr. Heynen's reports had been made available to the defense and the state more than a year ago, *id.* at 8, and reassured defense counsel that he would have "just as much time to speak with this witness . . . as the State has . . . . " *Id.* at 9.

That same day trial began, and De Freece testified that immediately before the offense he heard voices telling him to kill his wife. R VII 129, 155. Dr. Heynen was called by the state as a rebuttal witness and testified that, based on the tests given to De Freece at Vernon State Hospital, he knew the difference between right and wrong when he committed the murder. *Id.* at 176. After Dr. Heynen's direct testimony had concluded and court was recessed for the day, the witness assured the court that she would be available to consult with the defense before trial resumed the next morning. *Id.* at 181-82. The next day, Dr. Heynen was briefly cross-examined; the jury then was recessed, and the defense renewed its motions for appointment of a psychiatrist as a defense consultant. R VIII 7. When the court again offered to make the witness available for consultation with defense counsel, the defense again declined. R VIII 7-9. Cross-examination of Dr. Heynen resumed, and she testified that another doctor, Dr. Martinez, had diagnosed De Freece as suffering from both schizophrenia and organic brain syndrome, *id.* at 12-13. Dr. Heynen testified that she also had diagnosed De Freece as having diffuse organic brain damage, *id.* at 18, but that she disagreed with Dr. Martinez's diagnosis of schizophrenia. *Id.* at 20. Following closing arguments by both the state and defense that emphasized De Freece's mental state, the jury found De Freece guilty of murder.

De Freece appealed his conviction to the Eighth Court of Appeals of Texas, which held that "the trial court properly appointed the disinterested experts and . . . allowed sufficient time for Appellant to interview the one expert subpoenaed," App. B 9, and that De Freece's rights were not violated by the trial court's refusal to appoint an expert who would support his position. The court also noted that because the defense could have subpoenaed Dr. Martinez, "one of the court's disinterested experts [who] did in fact possess opinions supportive of [the defense's] position," *id.*, but did not do so, the trial court was correct in denying the defense's motion for an additional appointed expert.

The Court of Criminal Appeals granted discretionary review and, on February 24, 1993, reversed the judgment of the court of appeals and remanded the cause for a new trial. In doing so, the court opined that

> [c]ounsel for appellant did not ask for anything more than he was minimally entitled to under *Ake*. He did not request a particular psychiatrist, but only a single competent one. Nor did he seek a psychiatrist who would necessarily testify that his client was insane at the time of the offense. He simply sought expert guidance in evaluating the strength of appellant's defense, presenting it in the best possible light to the jury, and, in particular, in scrutinizing the testimony of Dr. Heynen, the only expert opinion then available that directly addressed the question of appellant's ability to distinguish right from wrong.

App. A 18. The court concluded by holding that "the trial court erred in denying appellant's request for the appointment of a psychiatrist to aid in the preparation and presentation of his insanity defense." *Id.*

REASONS FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED TO CLARIFY THE HOLDING OF *AKE V. OKLAHOMA*, 470 U.S. 68 (1985), AND RESOLVE A SUBSTANTIAL CONFLICT AMONG THE CIRCUITS AND STATE COURTS OF LAST RESORT.

A. Despite the attempts of the court below to distinguish contrary authority, there is an irreconcilable conflict.

As the opinion below demonstrates, App. A 13-16, there is a wide spectrum of authority as to precisely what burden *Ake* places on the states in criminal prosecutions. In considering De Freece's claim, the Court of Criminal Appeals attempted to distinguish those cases that reached a different result than its own on the basis that "[i]n each of th[o]se cases . . . the state institution had found no reason to doubt the defendant's sanity," App. A 11, whereas "[e]very court that has found the defendant did make an adequate showing that insanity would be a significant factor . . . has also held that *Ake* entitled [the defendant] to more than an examination . . . -- every court, that is, except the Fifth Circuit in *Granviel v. Lynaugh*, [881 F.2d 185 (5th Cir. 1989)]." *Id.* at 12. Despite the efforts of the court below to harmonize the various jurisdictions' interpretations of *Ake*, there in fact exists a diversity of opinion so great that this Court should grant review to clarify what *Ake* requires. At the very least, as the court below found, this case and *Granviel* represent an irreconcilable conflict within the Fifth Circuit that can be resolved only if review is granted. Indeed, the trial court expressly stated that it was relying on Fifth Circuit precedent in denying De Freece's request for the appointment of an additional psychiatric expert. R III 3-4.

Of the contrary cases recognized by the Texas Court of Criminal Appeals, App. A 11-12, several were decided on the

basis that the defendant had not made the threshold showing that insanity would be a significant factor at trial as required under *Ake*. *See, e.g., Beard v. State*, 816 S.W.2d 860, 863 (Ark. 1991); *Simmons v. Commonwealth*, 746 S.W.2d 393, 395 (Ky. 1988); *State v. Barrett*, 577 A.2d 1167, 1169 (Me. 1990); *State v. Robinson*, 395 S.E.2d 402, 406 (N.C. 1990); *Tuggle v. Commonwealth*, 334 S.E.2d 838, 843 (Va. 1985); *State v. Newcomer*, 737 P.2d 1285, 1291 (Wash. App. 1987); *United States v. Fazzini*, 871 F.2d 635, 639 (7th Cir. 1989); *Cartwright v. Maynard*, 802 F.2d 1203, 1211 (10th Cir. 1986); *Bowden v. Kemp*, 767 F.2d 761, 764 (11th Cir. 1985). In the other cases, however, relief was denied based on holdings that the appointment of a single, qualified expert--as was done in this case--satisfies the mandate of *Ake*. *Granviel v. Lynaugh*, 881 F.2d at 192; *State v. Hoopii*, 710 P.2d 1193, 1195-96 (Haw. 1985); *Djadi v. State*, 528 A.2d 502, 506 (Md. Ct. Spec. App. 1987); *State v. Hix*, 527 N.E.2d 784, 787 (Ohio 1988); *State v. Indvik*, 382 N.W.2d 623, 626 (N.D. 1986); *Willie v. State*, 585 So. 2d 660, 671 (Miss. 1991).

In *State v. Hoopii*, for instance, the defendant filed a notice of intention to rely on the insanity defense and a motion for psychiatric examination, and the trial court appointed a panel of two psychiatrists and a psychologist to examine him. 710 P.2d at 1194. After all three experts found that the defendant suffered from a mental disorder but was sane at the time of the offense and competent to stand trial, the trial court denied his request for additional expert witness funds. The state supreme court affirmed, holding that no evidence had been offered in support of the request for additional funds, *id.* at 1195, and that "*Ake* requires only that the defendant be assured access to one competent psychiatrist for examination and trial preparation purposes . . . . " and "the fact that all three concluded contrary to his position does not broaden this right and entitle him to a fourth expert as a matter of constitutional law." *Id.* at 1196. *Hoopii* cannot be squared with the opinion of the court below.

Similarly, in *Djadi v. State*, the defendant pled both insanity and incompetency to stand trial and requested a psychiatric evaluation. 528 A.2d at 503. He was committed to a state hospital, and all four experts who examined him found that he suffered from a mental disorder but was sane and competent. *Id.* The defense's request for additional funds for another psychiatric expert was denied, and the court of appeals affirmed, holding that the requirements of *Ake* had been met. *Id.* at 506. *Djadi* is in conflict with the holding of the court below.

B. The court below misconstrued several decisions that it found to be in harmony with its interpretation of Ake.

The court below found support for its holding in several cases that it interpreted to stand for the proposition that a defendant who is denied the services of a psychiatric expert as a defense consultant is entitled to a new trial. A review of those decisions, however, shows this view to be misleading, if not incorrect. In *Lindsey v. State*, 330 S.E.2d 563, 565-66 (Ga. 1985), the Georgia Supreme Court held that where sanity was to be a major issue at trial and the defendant was examined only as to his competency, a new trial was required under *Ake*. It was only after the state filed a motion for a rehearing asking, *inter alia*, whether the appointed expert becomes a "part of the defense team at trial," *id.* at 566, that the court filed an addendum stating that once a defendant has made *Ake*'s required showing, as based on the expert's exam report, he is entitled to the psychiatrist's assistance in "aiding defense counsel in the cross-examination and rebuttal of the state's medical experts." *Id.* at 567. The court thus decided a question that it need not have reached, and its supplemental holding is dicta.

The court below also relied on *Palmer v. State*, 486 N.E.2d 477 (Ind. 1985), as requiring appointed psychiatric experts to "consult[] with counsel during preparation for trial." App. A 13, *citing* 486 N.E.2d at 482. While it is true that *Palmer* requires that "counsel must have access to a psychiatrist

with whom to explore the details of the defendant's mental condition, formulate an understanding of the questions which will be at issue, and inquire about the validity of observations being made by other witnesses," *id.*, the court found this requirement to be satisfied by making the court-appointed experts available to the defense, recognizing that "a defendant is entitled to access to an expert, not access to an expert who sees the case his way." *Id.* Under that view, De Freece's *Ake* rights were protected because his trial court repeatedly assured the defense that the appointed psychiatrist would be available for consultation. Far from supporting the holding of the court below, *Palmer* in fact is persuasive authority to the contrary.

In *State v. Gambrell*, 347 S.E.2d 390, 395 (N.C. 1986), the North Carolina Supreme Court held that where a court-appointed psychiatrist did not assist the defense in "evaluating, preparing, and presenting his defense in both the guilt and sentencing phases," *Ake*'s requirements were not met. In reaching this conclusion, however, the court implicitly recognized that had the psychiatrist who had examined the defendant and found him to be both competent and sane provided such assistance, *Ake* would have been satisfied. *Id.*

The same analysis was used by the Ninth Circuit in *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990), where the appointed "psychiatrist's contact with Smith was limited to the court-ordered examination [and where] Smith's counsel never met with the psychiatrist to discuss the evaluation or to otherwise assess possible mitigating evidence." Under *Gambrell* and *Smith v. McCormick*, De Freece would not be entitled to relief, because in his case the court-appointed psychiatrist was in fact made available to assist in his defense. In addition, De Freece failed to subpoena Dr. Martinez, who had diagnosed him as schizophrenic. If the assistance De Freece received was constitutionally inadequate, it was due to his rejection of the trial court's offer for him to utilize the services that already had been provided him.

The Court of Criminal Appeals' reliance on *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985), likewise is misplaced. There, the Tenth Circuit held that *Ake*, coupled with 28 U.S.C. § 3006A(e)(1),[2] requires that the defendant be afforded "the assistance of an expert to interpret the findings of an expert witness and to aid in the preparation of his cross-examination." *Id.* at 929. The Tenth Circuit's conclusion that a defense consultant was required in that case is of no import to the case at bar, in which there was no statute mandating the authorization of expert services for trial assistance beyond that that De Freece already had been provided.

C. Important considerations of public policy and federal-state comity militate against the court below's interpretation of Ake.

There are other important considerations that call for this Court to grant review and correct the decision of the Court of Criminal Appeals. First, the precedents rejected by the court below--that *Ake* requires only that a disinterested expert be provided to examine the defendant and consult with the defense--represent a bright-line rule that is easily applied. By contrast, interpreting *Ake* to mandate the appointment of a second expert to function as a member of the defense team invites confusion by spawning numerous subsidiary issues. For instance, if the second expert is in complete agreement with the diagnosis of the first expert and is unable "to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts," App. A 19, is the defense then entitled to a *third* expert? And if such an expert is to function as a member of the defense team, will his failure to

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[2] 28 U.S.C. § 3006A(e)(1) provides, in pertinent part, that "Counsel for a person who is financially unable to obtain . . . expert . . . services necessary for adequate representation may request them in an ex parte application. Upon finding . . . that the services are necessary and that the person is financially unable to obtain them, the court . . . *shall* authorize counsel to obtain the services." (emphasis added).

undermine the testimony of the state's expert result in a finding of ineffective assistance sufficient to constitute reversible constitutional error? These and similar issues caution against acceptance of the Court of Criminal Appeals' interpretation of *Ake*.

In addition, settled notions of federal-state comity call for reversal. While how the state's fisc might be affected is not a sufficient basis on which to deny a constitutionally protected right, *Ake*, 470 U.S. at 78-79, it certainly is an appropriate consideration in determining the scope of any such right. Here, it cannot be gainsaid that the state will suffer a substantial, additional economic burden if the opinion below is allowed to stand uncorrected. The significance of this factor--in light of the minimal enhancement of the truth-seeking function of the criminal justice system that might accrue from application of the court below's rule--militates in favor of the bright-line rule discussed above.

Finally, De Freece's actions at trial should serve to disentitle him to the relief granted by the court below. It is undisputed that De Freece was provided with Dr. Heynen's report more than a year prior to trial and was afforded the opportunity to consult extensively with her prior to cross-examination. It likewise is undisputed that he also could have subpoenaed Dr. Martinez, whose diagnosis was supportive of his insanity defense. De Freece declined both opportunities. To find a constitutional violation on these facts can serve only to encourage the most egregious sort of sand-bagging by defense counsel. The holding of the court below flies in the face of equitable principles and venerable precedent regarding the waiver of constitutional rights.

CONCLUSION

For the foregoing reasons, Petitioner prays that the writ of certiorari to the Texas Court of Criminal Appeals issue.

Respectfully submitted,

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APPENDIX A

HAROLD LINDSAY DE FREECE, Appellant

NO. 0502-92 v. - - - - Petition for Discretionary Review from the Eighth Court of Appeals

THE STATE OF TEXAS, [TERRELL County]

OPINION ON APPELLANT'S
PETITION FOR DISCRETIONARY REVIEW

Appellant was convicted by a jury of the offense of murder and his punishment assessed by the trial court at 60 years confinement in the penitentiary. On appeal he argued that the trial court erred in failing to appoint an expert to assist him in evaluation, preparation, and presentation of his insanity defense, in violation of his constitutional rights to due process, equal protection, effective assistance of counsel and compulsory process. The Eighth Court of Appeals disagreed, holding, inter alia, that appellant received all the expert assistance he was constitutionally entitled to under the provisions of Article 46.03, §3, V.A.C.C.P. De Freece v. State, 829 S.W.2d 251 (Tex.App - El Paso 1992). In his petition for discretionary review appellant reiterates his claim that under Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), he was entitled to more than just the "disinterested experts" provided for by Article 46.03, §3, supra. We granted the petition to address this claim. Tex.R.App.Pro., Rule 200(c)(2).

I.

Appellant and the deceased, Juanita Rodriguez, had a five month old son. On the morning of February 17, 1989, appellant went to the home of Juanita's parents in Eagle Pass,

where she and the baby were staying. Appellant was told by Juanita's sister that Juanita and her parents and brother had left that morning to drive to Pecos. Based upon statements he claimed Juanita's mother had made on prior occasions, appellant decided that the group intended to sell the baby in Pecos, and set out after them. He caught up with them on Highway 90 between Dryden and Sanderson, and ran them off the road. According to his testimony, at this time appellant heard voices he "couldn't overcome" which commanded him to "kill, kill." He forced Juanita into his car, where he stabbed her numerous times in the chest and abdomen, and then cut her throat. Texas Rangers apprehended him the next day a mile from the scene, and he readily confessed. The grand jury indicted him on March 20, 1989.

On June 23, 1989, the State filed a motion requesting that appellant be examined both for competency to stand trial and sanity at the time of the offense. Pursuant to Articles 46.02 and 46.03, V.A.C.C.P., the trial court ordered appellant sent to Vernon State Hospital "for observation, examination and treatment." There, Dr. D. F. Martinez, a psychiatrist, diagnosed him as suffering from "Schizophrenia, Chronic, Undifferentiated Type." Dr. F. E. Heynen, a clinical psychologist, opined that appellant was incompetent to stand trial, but that at the time of the offense he "had substantial capacity to appreciate the wrongfulness of his behavior and understood that his behavior was unlawful." On September 11, 1989, a jury found appellant presently incompetent, but capable of attaining competency in the foreseeable future; judgment to that effect was entered on September 13, 1989. Accordingly, appellant was returned to Vernon State Hospital, where he was re-evaluated every ninety days. See Article 46.02, §§4(g) & 5(c), supra. On December 7, 1989, and again on March 12, 1990, the hospital reported that appellant had not yet attained competency, apparently on recommendations from Dr. Martinez. Finally, on June 1, 1990, the trial court was notified that appellant was competent to stand trial, although Dr. Martinez advised that "he should continue his

present medications consisting of neuroleptics and antidepressants."

On August 20, 1990, counsel for appellant filed a motion requesting the appointment of a psychiatric expert to assist in preparing and presenting his insanity defense. The trial court took the motion under advisement. On September 18, 1990, counsel filed another motion urging his incompetency to try the case without expert assistance, and essentially requesting a continuance. A hearing was held during which counsel for appellant argued that the trial court had misconstrued his August 20 motion as a request for a specific expert. Counsel clarified that he sought no particular expert, but simply any competent psychiatrist who:

> "would be a member of the defense team, would be available for helping preparation of the case, preparation for cross examination, deciding which tests were needed, range and form, that sort of thing, as well as being present during trial to help the defendant."

The trial court stated, inter alia, that "I've already appointed a psychiatrist to conduct an evaluation, and I don't feel I have to appoint another one[.]" Instead, the court assured appellant's counsel that he would be afforded an opportunity to interview Dr. Heynen, who was scheduled to testify for the State, prior to cross-examining her. Counsel for appellant complained that he

> "[did] not believe the ability to speak to this one doctor solves the problem, because number one, she's already on record in writing as supporting the State's position, and number two, she will give no assistance in how to cross-examine her . . . . We think that we still need the expert on the defense team."

The trial court denied both appellant's motions.

Trial commenced that same day. Other than his testimony that he had heard voices commanding him to "kill, kill," appellant presented no direct evidence to show he was insane at the time of the offense. In rebuttal the State put Dr. Heynen on the witness stand to testify that any voices appellant may have heard would not be "sufficiently compelling to cause him to forget that this was a wrongful thing to do." After reading a number of reports from other clinics, conducting a battery of tests, and consulting with other staff members at Vernon State Hospital, she concluded that appellant had known the difference between right and wrong when he committed the offense. See V.T.C.A. Penal Code, §8.01. After this testimony the trial court adjourned for the day, and Dr. Heynen assured the trial court that she would be available to consult with appellant's counsel.

The next morning counsel took Dr. Heynen on cross-examination. She agreed that appellant's records from his stay at Vernon State Hospital "weigh several pounds." Out of the presence of the jury appellant then renewed his motion for expert assistance to help him interpret those voluminous records with a view to cross-examining Dr. Heynen. Once again the trial court asked counsel:

> " . . . Do you want to talk with [Dr. Heynen] some more if you have problems, because I think the lady would be happy to go over all this with you.
>
> [DEFENSE COUNSEL]: Your Honor, my greatest need is to be able to impeach her testimony and to discredit it, and of course, she's not available for that. That's what I need for cross examination, so I see no benefit in talking to her.

> THE COURT: I thought you said you were incompetent and couldn't understand these records.
>
> [DEFENSE COUNSEL]: I am.
>
> THE COURT: I'm offering, if she can help you with any terms or -- she said she would stay over yesterday.
>
> [DEFENSE COUNSEL]: My problem is to point out where she's wrong, Your Honor. I don't believe she's available for that."

The trial court again denied the motion.

As cross-examination continued, Dr. Heynen verified that Dr. Martinez had diagnosed appellant as suffering from undifferentiated schizophrenia, organic brain syndrome, and extreme psychosocial stressors. Dr. Heynen admitted that she herself had found that appellant had "diffuse organic brain damage." She believed his earlier history of commitment to mental hospitals, however, was "generally because of drug abuse." Disagreeing with Dr. Martinez' evaluation of appellant as schizophrenic, Dr. Heynen opined that her own diagnostic skills "far exceed those of Dr. Martinez." She acknowledged that another doctor had earlier found in appellant "the capacity . . . to decompensate and to be a danger to himself and others." She pointed out, however, that this doctor did not "give any reason why he thought he had decompensated." On redirect examination Dr. Heynen noted several typical characteristics of schizophrenia (e.g., incoherence, impaired personal hygiene, "flat affect") that appellant did not manifest.

During final argument appellant's counsel conceded that the evidence showed appellant caused the death of Rodriguez. Emphasizing appellant's history of mental health commitments and his apparently delusional belief that Rodriguez' family intended to sell his baby, counsel argued that the jury should find

that when appellant killed Rodriguez, he did not appreciate the wrongfulness of his conduct. In rebuttal, the State stressed Dr. Heynen's testimony that appellant could distinguish right from wrong when he committed the offense. After deliberating for five hours, the jury returned a guilty verdict.

The court of appeals held that failure of the trial court to grant appellant's persistent motions to appoint an independent psychiatric expert to assist him was not error. The reasoning of the court of appeals was threefold, as we understand it. First, the court of appeals observed that the trial court had appointed "disinterested experts" in accordance with Article 46.03, supra, which statutory scheme has been found by the United States Fifth Circuit Court of Appeals to satisfy constitutional requirements of Ake v. Oklahoma, supra.[1] See Granviel v. Lynaugh, 881 F.2d 185, at 191-92 (CA5 1989), cert. denied, 495 U.S. 963, 110 S.Ct. 2577, 109 L.Ed.2d 758 (1990). Second, the court of appeals believed that by his "admirable" cross-examination of Dr. Heynen, counsel for appellant succeeded in impeaching her without the benefit of expert assistance. De Freece v. State, supra, at 255. Finally, the court of appeals faulted appellant for not subpoenaing Dr. Martinez, thereby obtaining what would likely have been favorable testimony without putting the trial court to the necessity of appointing an additional expert. Id., at 256. We will address each of these reasons in turn.

II.

In treating the court of appeals' first reason for rejecting appellant's Ake claim, we confront the question whether examination by "disinterested experts" at Vernon State Hospital,

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[1] Of course, Ake v. Oklahoma was decided as a matter of federal due process. That the statutory scheme meets constitutional muster under Ake would not seem an adequate response to appellant's claims that he was also denied equal protection, effective assistance of counsel and compulsory process.

pursuant to Article 46.03, §3(a), supra, and testimony from at least one of those experts at trial about conclusions she drew from that examination, were sufficient to meet the due process minimum announced in Ake. Appellant does not claim he was deprived of the opportunity to be examined by a competent expert on the question of sanity, as was Ake. He does claim, however, that, having shown his sanity would be a significant factor at his trial, he should have been provided an expert of the court's choosing to help him evaluate and prepare his sanity defense, and meaningfully confront expert testimony adduced by the State. We agree, and hold that the trial court erred in denying him that assistance.

Our analysis begins with a brief overview of Article 46.03, §3(a), supra, and the Fifth Circuit's conclusion in Granviel v. Lynaugh, supra, that the neutral "court's expert" it provides is sufficient to comply with Ake. Next we review the decision in Ake itself, followed by an examination of what other jurisdictions have held regarding the scope of psychiatric assistance that Ake requires. Finally we explain our own understanding of the scope of psychiatric assistance under Ake, and apply that understanding to the facts of the instant case.

Article 46.03

Before 1967 there was no express authority in Texas for appointing an expert to examine a criminal accused to determine either competency to stand trial or sanity at the time of the offense. For that reason this Court held that trial courts did not abuse their discretion in failing to do so. Ellzey v. State, 158 Tex.Cr. R. 604, 259 S.W.2d 211 (1953); Crain v. State, 394 S.W.2d 165 (Tex.Cr.App. 1964). Nor did this Court perceive that the federal constitution required even so much as a state-sponsored examination for sanity, much less an expert for the express purpose of assisting the defense. Crain v. State, supra; Bush v. State, 172 Tex.Cr. R. 54, 353 S.W.2d 855 (1962), citing United States ex rel. Smith v. Baldi, 344 U.S. 561, 73 S.Ct. 391,

97 L.Ed. 549 (1953).[2] By way of amendment to Article 46.02, supra, adding §2(f)(1), the Legislature provided for the first time in 1967 that:

> "[t]he court may, at its discretion appoint disinterested qualified experts to examine the defendant with regard to his present competency to stand trial and to his sanity, and to testify thereto at any trial or hearing in connection to the accusation against the accused."

Acts 1967, 60th Leg., ch. 659, p. 1750, §33, eff. August 28, 1967. In 1975 the Legislature enacted Article 46.03, supra, and placed the provision governing appointment of experts to determine sanity there, apart from provisions relating to competency to stand trial, which remained in Article 46.02, supra. See Acts 1975, 64th Leg., ch. 415, p. 1095, eff. June 19, 1975.

As of the time of trial in this cause, §3(a) of Article 46.03, supra, read:

> "If notice of intention to raise the insanity defense is filed under Section 2 of this article, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health and mental retardation to examine the defendant with

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2 Bush ultimately obtained relief in a federal habeas corpus petition, Bush v. McCollum, 231 F.Supp. 560 (N.D. Texas 1964), aff'd, 344 F.2d 672 (CA5 1965), but not before the cause on original appeal was remanded once by the United States Supreme Court, Bush v. Texas, 372 U.S. 586, 83 S.Ct. 922, 9 L.Ed.2d 958 (1963), and his claim once again rejected by this Court in Bush v. State, 372 S.W.2d 683 (Tex.Cr.App. 1963).

> regard to the insanity defense and to testify thereto at any trial or hearing on the issue."

Under §3(d) of Article 46.03, then as now, the appointed expert or experts must submit a written report to the trial court within thirty days detailing their "observations and findings pertaining to the insanity defense." The trial court is required to furnish a copy of the report to both the State and the defendant. Accordingly, we have characterized experts under these provisions as "not appointed by the court as the expert of the State or the defense, but [as] the court's disinterested witness." Granviel v. State, 552 S.W.2d 107, at 115 (Tex.Cr.App. 1976). However, §3(f) of Article 46.03, supra, requires the trial court to provide "a reasonable opportunity" for the accused "to be examined by a psychiatrist or other expert of his own choice[.]" While §3(f) does not speak to the question whether, if the accused cannot afford an expert "of his own choice," one must be provided for him, we have indicated that counsel may obtain an expert to examine his indigent client by operation of Article 26.05, V.A.C.C.P. Von Byrd v. State, 569 S.W.2d 883, at 896 (Tex.Cr.App. 1978).[3]

In Granviel v. Lynaugh, supra, the petitioner challenged the constitutionality of the Texas statutory scheme under Ake v. Oklahoma, supra. The trial court had appointed a "disinterested expert" as per the statute to examine Granviel prior to trial, but

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[3] But failure of the trial court to appoint a psychiatric expert is subject to the same abuse of discretion standard by which we measure any other failure to appoint an expert under Article 26.05, supra. Stoker v. State, 788 S.W.2d 1, at 16-17 (Tex.Cr.App. 1990); Hammett v. State, 578 S.W.2d 699, at 705-707 (Tex.Cr.App. 1979). And presumably counsel must have already "incurred" the expense of an independent examination of his client "with prior court approval" before Article 26.05 authorizes compensation. Cf. Myre v. State, 545 S.W.2d 820, at 826 (Tex.Cr.App. 1977) (under former incarnation of Article 26.05, supra, defendant must show he "incurred" expense before he can be compensated); Eggleston v. State, 422 S.W.2d 460, at 463-64 (Tex.Cr.App. 1968) (same).

refused to appoint another psychiatric expert at Granviel's request whose report would be unavailable to the State. The Fifth Circuit denied relief, holding that the Texas procedure was sufficient to comply with Ake, essentially because it believed that "[a]vailability of a neutral expert provides defendants with 'the raw materials integral to the building of an effective defense.'" 881 F.2d at 192, quoting Ake v. Oklahoma, 470 U.S. at 77, 105 S.Ct. at 1093, 84 L.Ed.2d at 62. We do not think careful consideration of Ake, with its emphasis on due process in the context of an adversarial system, bears this view out.

Ake v. Oklahoma

Accused of capital murder, Glen Burton Ake displayed such odd behavior at his arraignment that the trial court ordered an examination to decide whether he should be observed to determine his competency to stand trial. The psychiatrist who examined Ake concluded he was a paranoid schizophrenic, and he was committed to a state hospital, where he was found incompetent. Six weeks later he was found to have regained competency, subject to continued treatment with an anti-psychotic drug, Thorazine. Prior to trial his attorney indicated he would raise the defense of insanity, and requested psychiatric assistance, since Ake was indigent. Even though the state hospital had made no determination of Ake's sanity at the time of the offense, the trial court denied his request. "As a result there was no expert testimony for either side on Ake's sanity at the time of the offense." Ake v. Oklahoma, 470 U.S. at 72, S.Ct. at 1091, L.Ed.2d at 59.[4] The Oklahoma Court of Criminal Appeals affirmed Ake's conviction, holding that the State had no obligation to provide psychiatric services to indigents in capital cases.

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[4] Emphasis in the original. All other emphasis supplied unless otherwise indicated.

The United States Supreme Court reversed Ake's conviction. In its opinion the Court began by reaffirming the principle that due process requires that the indigent accused in a criminal trial must be equipped with the "basic tools" to ensure "a proper functioning of the adversary process[.]" Id., U.S. at 77, S.Ct. at 1093, L.Ed.2d at 62. Deciding whether a psychiatric expert was necessary to that end, the Court considered three factors borrowed from cases involving questions of procedural due process, viz:

> "The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided."

Id. The accused's interest in maintaining the institutional presumption of innocence, the Court observed, "is obvious." The State, on the other hand, has more than the ordinary adversarial interest in prevailing; it has a concomitant interest in the fairness of the proceeding and the accuracy of the result. Moreover, because most states already provide some level of psychiatric assistance to the accused, that burden cannot be prohibitive. In these lights the Court concluded that the State's interest "is not substantial[.]" Id., U.S. at 79, S.Ct. at 1094, L.Ed.2d at 63-64.

Assessing the third factor, the Court began "by considering the pivotal role that psychiatry has come to play in criminal proceedings." Id.

> "In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge and jury; they analyze the information gathered and from it draw plausible conclusions about the

> defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers."

Id., U.S. at 80, S.Ct. at 1095, L.Ed.2d at 64. Thus, psychiatric experts may assist lay judges and jurors to make an informed decision about the sanity of the accused at the time of the offense. Because psychiatry is not "an exact science," however, juries remain the "primary factfinders," and, the Court suggested, it is important that the jury hear "the psychiatrists for each party" to equip it to make as informed a decision as possible. Id., U.S. at 81, S.Ct. at 1095, L.Ed.2d at 65. To avoid the risk of an inaccurate verdict, the Court concluded, an indigent accused must be provided an expert "to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses[.]" Id., U.S. at 82, S.Ct. at 1096, L.Ed.2d at 65.

The Court concluded:

> "We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. That is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a

> competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right."

Id., U.S. at 83, S.Ct. at 1096, L.Ed.2d at 66.[5]

Persuasive Authority

Commentators have noted an "ambiguity" in Ake, a seeming internal contradiction between the express right to a single competent psychiatric expert not of the accused's choosing, on the one hand, and indications throughout the opinion, on the other, that the accused is entitled to an expert who will participate with him as a partisan in the case. E.g., Note, Due Process and Psychiatric Assistance: Ake v. Oklahoma, 21 Tulsa L.J. 121, at 143-46 (1985); Note, Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma, 84 Mich.L.Rev. 1326, at 1345-57 (1986). Some courts have targeted the first aspect of Ake to hold that a single "neutral" expert is all the State need supply to ensure proper adversarial functioning. Thus, many courts have denied Ake claims where the accused has received an examination in a state mental institution pursuant to court order, holding that the state-sponsored examination met all due process requirements. E.g., Beard v. State, 306 Ark. 546, 816 S.W.2d 860 (Ark. 1991); State v. Hoopii, 710 P.2d 1193 (Hawaii 1985); Djadi v. State, 72 Md.App. 223, 528 A.2d 502 (Md.App. 1987); Willie v. State, 585 So.2d 660 (Miss. 1991); State v. Hix, 38 Ohio St.3d 129, 527 N.E.2d 784 (Ohio 1988); State v. Indvik, 382 N.W.2d 623 (N.D. 1986). In each of these cases, however, the state institution had found no reason to doubt the defendant's sanity, and therefore the court also found

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[5] This Court does not understand the holding of Ake to be limited to the context of capital offenses. See McBride v. State, 838 S.W.2d 248 (Tex.Cr.App. 1992).

the defendant had not shown insanity would be a significant factor at trial in any event. Many other courts have held similarly that, where a state-sponsored examination reveals no likelihood of insanity at the time of the offense, a defendant has not met the threshold requirements for relief under Ake. E.g., Simmons v. Commonwealth, 746 S.W.2d 393 (Ky. 1988); State v. Barrett, 577 A.2d 1167 (Me. 1990); State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (N.C. 1990); Tuggle v. Commonwealth, 334 S.E.2d 838 (Va. 1985); State v. Newcomer, 48 Wash.App. 83, 737 P.2d 1285 (Wash.App. 1987); Glass v. Blackburn, 791 F.2d 1165 (CA5 1986); United States v. Fazzini, 871 F.2d 635 (CA7 1989); Cartwright v. Maynard, 802 F.2d 1203 (CA10 1986); Bowden v. Kemp, 767 F.2d 761 (CA11 1985). Every court that has found the defendant did make an adequate showing that insanity would be a significant factor, however, has also held that Ake entitled him to more than an examination and testimony, if favorable, from a neutral psychiatric expert -- every court, that is, except the Fifth Circuit in Granviel v. Lynaugh, supra.

In Lindsey v. State, 254 Ga. 444, 330 S.E.2d 563 (Ga. 1985), evidence that the defendant had a history of mental problems, and had been diagnosed as a paranoid schizophrenic and prescribed antipsychotic medications, was held sufficient to show his sanity at the time of the offense would be a significant factor at trial. The Supreme Court of Georgia therefore reversed the conviction on authority of Ake. Responding to the State's contention that access to and the opportunity to confer with a neutral expert would be enough to satisfy Ake, the court concluded that "in addition to examining the defendant, the psychiatrist must assist the defense by aiding defense counsel in the cross-examination and rebuttal of the state's medical experts." Id., S.E.2d at 567. See also Holloway v. State, 257 Ga. 620, 361 S.E.2d 794 (Ga. 1987).

In Palmer v. Indiana, 486 N.E.2d 477 (Ind. 1985), the Supreme Court of Indiana examined its statutory scheme for providing expert examination for insanity claimants. Under

Indiana law, upon notice of an insanity defense, the trial court is automatically to appoint at least two medical experts, one of whom must be a psychiatrist, to examine the defendant. The court recognized that one requirement of Ake is that defense counsel be provided with an expert with whom to consult "about the validity of observations being made by other witnesses." Id., at 482. Accordingly, the court directed that its statutory scheme be implemented with the understanding that the appointed psychiatrist "be available for consultation with counsel during preparation for trial." Id.

The defendant in State v. Gambrell, 347 S.E.2d 390 (N.C. 1986), was found to be in need of psychiatric care, and was committed to a state hospital for determination of his capacity to stand trial. The examining psychiatrist's initial impression was that the defendant was "probably schizophrenic," and he was medicated with psychotropic drugs. Ultimately the psychiatrist found him both competent and sane. Nevertheless, in view of the initial skepticism about Gambrell's mental condition, along with some indication of mental illness in his family history, the Supreme Court of North Carolina concluded he had shown that his sanity would be a significant factor at trial. Holding that a state-sponsored psychiatric expert was acceptable under Ake, the court reversed the conviction nevertheless because the defendant had obtained only an examination by the state psychiatrist, but had received no aid in "evaluating, preparing, and presenting his defense at both the guilt and sentencing phases." Id., at 395.

The federal courts of appeals have also been inclined to hold that defendants who meet the threshold showing of Ake are entitled to more than a "neutral" testifying expert. Smith v. McCormick, 914 F.2d 1153, at 1158-59 (CA9 1990). In United States v. Sloan, 776 F.2d 926 (CA10 1985), the trial court appointed a psychiatrist to report to the court after an examination to determine competency and sanity of the defendant. The examiner reported that Sloan "suffered from a borderline schizoid personality," but that he was both competent

and sane. Sloan requested a defense psychiatrist to help him understand the examining psychiatrist's report and to prepare to cross-examine him at trial, which was denied. The Court of Appeals reversed the conviction, holding that without the aid the defendant had requested, he was deprived of due process. Along the way the Court of Appeals observed, "The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution." Id., at 929. See also United States v. Crews, 781 F.2d 826 (CA10 1986); Liles v. Saffle, 945 F.2d 333 (CA10 1991).

In Cowley v. Stricklin, 929 F.2d 640 (CA11 1991), the state trial judge had committed the defendant to mental institutions on three occasions before he was prosecuted for sexual assault. An earlier diagnosis found he suffered from schizophrenia, but at the state mental health facility he was found competent to stand trial and mentally responsible for the offense. The court refused Cowley's request for an appointed expert, despite representations from a psychologist who had volunteered his services and examined Cowley briefly, that he was still schizophrenic. On federal habeas corpus, Alabama argued that because the defendant had had access to the reports of the state psychiatrist, and help from the volunteer psychologist, there was no Ake violation. The Court of Appeals rejected these contentions, observing that the state's psychiatrist "did not assist in Cowley's trial preparation and obviously could not have assisted Cowley in his own cross-examination." Id., at 644. Moreover, the psychologist had not interviewed Cowley in any depth in ten years, and had not been able to form an opinion as to his sanity at the time of the offense. Cowley's conviction was reversed and remanded to the state court for retrial or release. See also Buttrum v. Black, 721 F.Supp. 1268 (N.D. Ga. 1989), aff'd, 908 F.2d 695 (CA11 1990).

Thus, it is true that some jurisdictions have said, essentially in dicta, that the statutory provision of a single neutral psychiatrist to service both parties and the court is sufficient to

meet the due process minimum of Ake.[6] However, it appears that, Granviel v. Lynaugh, supra, notwithstanding, the greater weight of authority holds otherwise. And, in our view, with good reason.

Ake and Article 46.03

Ours is an adversarial system of criminal justice, not an inquisitorial one. Either mode of inquiry is aimed at assessing the truth. However, the adversarial model rests on the assumption that each party to a dispute, motivated by self-interest, will develop his position to the greatest extent possible within the boundaries of the rules of evidence and procedure, thus providing the fact-finder an optimal vantage from which to gauge all relevant facts and make an informed decision on the merits. In Ake the Supreme Court reiterated that where the defendant is indigent, due process requires that the State guarantee he be at least minimally equipped to participate meaningfully in this adversarial process.

Where sanity of the indigent accused will be a significant factor at trial, psychiatry has come to play a "pivotal role." 470 U.S. at 79, 105 S.Ct. at 1094, 84 L.Ed.2d at 64. But since psychiatry "is not . . . an exact science," equally competent

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6 The State argues that denial of petition for writ of certiorari in Granviel v. Lynaugh, supra, 495 U.S. 963, 110 S.Ct. 2577, 109 L.Ed.2d 758 (1990), shows that the Supreme Court endorses the view that examination by a neutral psychiatrist satisfies Ake. But the denial of a petition for writ of certiorari has no more precedential value than does the refusal of a petition for discretionary review in this Court. E.g., Hopfman v. Connolly, 471 U.S. 459, 105 S.Ct. 2106, 85 L.Ed.2d 469 (1985). Nor do two other cases cited by the State in which petitions for writ of certiorari were denied, viz: Glass v. Blackburn, 791 F.2d 1165 (CA5 1986), cert. den., 481 U.S. 1042, 107 S.Ct. 1985, 95 L.Ed.2d 824 (1987), and State v. Vickers, 159 Ariz. 532, 768 P.2d 1177 (Ariz. 1989), cert. den., ___ U.S. ___, 110 S.Ct. 3298, 111 L.Ed.2d 806 (1990), even stand for the proposition, as we understand them, that examination by a neutral psychiatrist is all that due process requires.

practitioners confronted with the same raw data often disagree in their diagnoses in an area that is "inevitably complex and foreign" to lawyers and juries alike. U.S. at 81, S.Ct. at 1095, 84 L.Ed.2d at 64-65. Although psychiatric testimony is undoubtedly useful in the resolution of many issues in the adversary trial context, including sanity at the time of the offense:

> "[n]one of these issues . . . can be addressed by a psychiatrist with absolute certainty. Thus, to expect the 'objective' opinion of an amicus expert to yield 'the answer' in a particular case is unrealistic. Unless the choices made by the psychiatrist in the establishment and proof of his or her hypothesis are open to informed scrutiny, the psychiatrist's conclusions are of limited value. And, unless each party has access to psychiatric assistance in preparing and directing this scrutiny, it cannot be expected that the scrutiny will be adequately informed. Indeed, each party must have the opportunity to explore and explain the relevant psychiatric data in a case if the conclusions drawn from these data are properly to be understood by the judge or the jury and the 'truth' is to be most closely approximated. This is the teaching of Ake v. Oklahoma."

Showalter & Fitch, Objectivity and Advocacy in Forensic Psychiatry After Ake v. Oklahoma, 15 J. Psychiatry & L., 177, at 186 (1987). Because psychiatric evidence is at once esoteric and uncertain, the indigent accused needs a psychiatrist, inter alia, "to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witness," if he is to present the factfinder with a perspective broad enough to ensure an informed resolution of the sanity question. U.S. at 82, S.Ct. at

1096, L.Ed.2d at 65. Otherwise the risk of error is intolerably high, and due process will be offended.

In Granviel v. State, supra, at 115, we called the "disinterested experts" contemplated by former Article 46.02, §2(f)(1), now Articles 46.02, §3(a) & 46.03, §3(a), "the court's . . . experts." See also Von Byrd v. State, supra, at 896. We reject the notion that a "court's expert" necessarily fulfills the role of psychiatric assistant to the indigent accused envisioned by Ake. Such a "court's expert" may well serve an important function in identifying whether sanity will be a significant factor at trial. But in an adversarial trial itself, judge and jury necessarily play a passive, neutral role. In that context the phrase "court's expert" is an oxymoron. It is the parties, not the judge, who supply evidence from which the jury is to distill the truth. And while it is true, as the Fifth Circuit echoes in Granviel v. Lynaugh, supra, at 191, that "[a] psychiatrist's examination is not an adversary proceeding[,]" the trial at which the State adduces evidence of that examination most certainly is.

In an adversarial system due process requires at least a reasonably level playing field at trial. In the present context that means more than just an examination by a "neutral" psychiatrist. It also means the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts. We recognize that the accused is not entitled to a psychiatrist of his choice, or even to one who believes the accused was insane at the time of the offense. Ake makes this much clear. But even a psychiatrist who ultimately believes the accused was sane can prove invaluable by pointing out contrary indicators and exposing flaws in the diagnoses of State's witnesses.

None of this is to say that Article 46.02, §3(a), supra, is unconstitutional. As in other jurisdictions, a preliminary exam-

ination by "disinterested experts" under this provision may show insanity is not to be a significant factor in the case. In that event the due process right articulated in Ake would not be triggered. Where that examination shows a viable insanity claim, however, due process does not end there. The accused must be given the means to advance that claim at trial. Thus, more than the appointment of "disinterested experts" under Article 46.03, supra, is required. Once it is shown that insanity will be a significant factor at trial, the trial court abuses its discretion in failing to appoint, or to give "prior . . . approval" to "reasonable expenses incurred" by counsel for the accused to obtain, a competent psychiatrist to assist in the evaluation, preparation and presentation of his insanity defense. Article 26.05(a), supra.

Application of Ake

The State does not contest that in this cause appellant demonstrated to the trial court that insanity would be a significant factor at trial, as indeed it turned out to be. The facts of the offense itself are fairly bizarre, as the trial court would have been aware at least by the time he denied appellant's latest request for expert assistance. The State itself questioned both his sanity and his competency to stand trial, and he was indeed found to be incompetent. He did not attain competency for another eight months, and then, only subject to continued medication. While the only opinion expressed prior to trial as to his sanity at the time of the offense, from the clinical psychologist, Dr. Heynen, is that he was sane, the treating psychiatrist, Dr. Martinez, believed him to be schizophrenic. He had a significant history of commitment in mental health facilities. These facts conduce to show, no less than those in Ake, U.S. at 86, S.Ct. at 1098, L.Ed.2d at 68, that insanity was not only a significant factor at trial, it was the only contested issue. See also, e.g., Gambrell v. State, supra; United States v. Sloan, supra; Cowley v. Stricklin, supra. And in fact counsel conceded in final argument that his client caused the death of Rodriguez, arguing only that he had not perceived his conduct to be wrong.

Counsel for appellant did not ask for anything more than he was minimally entitled to under Ake. He did not request a particular psychiatrist, but only a single competent one. Nor did he seek a psychiatrist who would necessarily testify that his client was insane at the time of the offense. He simply sought expert guidance in evaluating the strength of appellant's defense, presenting it in the best possible light to the jury, and, in particular, in scrutinizing the testimony of Dr. Heynen, the only expert opinion then available that directly addressed the question of appellant's ability to distinguish right from wrong. Even a neutral "court's expert" cannot effectively prepare counsel to cross-examine herself. Cowley v. Stricklin supra; Buttrum v. Black, supra. We hold that the trial court erred in denying appellant's request for the appointment of a psychiatrist to aid in the preparation and presentation of his insanity defense.

III.

The court of appeals believed counsel was able to conduct an "admirable" cross-examination of Heynen without the benefit of psychiatric assistance. As appellant notes, this smacks of a harmless error analysis. But in Ake itself the Supreme Court reversed the conviction and remanded the cause for new trial without conducting a harm analysis. See Vickers v. Arizona, ___ U.S. ___, at ___, 110 S.Ct. 3298, at 3300, 111 L.Ed.2d 806, at 809 (1990) (Marshall, J., dissenting to denial of petition for writ of certiorari). In any event, we would not conclude that the error in failing to appoint a psychiatrist to consult with counsel was harmless error in this cause. First, help in preparing to cross-examine State's witnesses is not the only function of an appointed psychiatrist contemplated by Ake. Even if it were, that counsel did an "admirable" job in cross-examining Heynen does not mean he could not have done an even more effective job with the aid of an expert to interpret the voluminous data from Vernon State Hospital from which her opinion was derived. Especially considering that, although the only contested issue at trial was sanity, the jury nevertheless deliberated for five hours before convicting appellant, we could

not say beyond a reasonable doubt that the failure to appoint the requested expert did not contribute to the verdict in this cause.

IV.

Finally, the court of appeals believed appellant could have obtained all the succor to which he was constitutionally entitled by subpoenaing Dr. Martinez to testify at trial. We disagree. To begin with, once it is shown that insanity will be a significant factor at trial, more than just favorable psychiatric testimony -- if that is even available -- is required to fully satisfy Ake.[7] Martinez was not present to help counsel interpret the hospital records or critically examine Heynen's conclusions for purposes of cross-examining her (even had he been inclined to do so, considering that they were colleagues). For counsel to have elicited an opinion from Martinez before trial, without first obtaining his appointment or the provision of funds to hire him as a defense expert, would have risked generating another witness for the State, should Martinez' ultimate opinion on the issue of insanity prove to be unfavorable.[8] That Martinez

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7 Again, we do not suggest that Ake guarantees appointment of an expert who will testify that the accused is insane. But once it is shown that insanity will be a significant factor at trial, appellant is entitled to the appointment of a psychiatric expert. If the appointed psychiatrist believes the accused was insane, he may certainly so testify. But even if he does not, he must be made available to consult with counsel, to interpret records, to prepare counsel to cross-examine State's witnesses, and generally to help present appellant's defense in the best light.

8 Until such time as Martinez may be appointed by the court as a defense expert, he would remain, under Article 46.03, supra, a "court's expert," and as such, not subject to the attorney-client privilege. Granviel v. State, supra, at 115. But had the trial court appointed him as a defense expert, Martinez would have been a "representative of the lawyer," i.e., "one employed by the lawyer to assist the lawyer in the rendition of professional legal services[.]" Tex.R.Cr.Evid., Rule 503(a)(4). As such he could be prevented "from disclosing any . . . fact which came to [his] knowledge . . . by reason of the attorney client relationship." Tex.R. Cr.Evid., Rule 503(b).

believed appellant to be a schizophrenic was already before the jury. We cannot agree that counsel's failure to risk calling Martinez to the witness stand should operate to nullify his right under Ake to the aid and consultation of a psychiatric expert. See Cowley v. Stricklin, supra, at 644-45; State v. Moore, 321 N.C. 327, 364 S.E.2d 648, at 653-54 (1988).

V.

We therefore reverse the judgment of the court of appeals and remand the cause for new trial.[9]

CLINTON, Judge

(Delivered: February 24, 1993)
EN BANC
PUBLISH

McCormick, P.J., concurs in the result.
White, J., dissents.

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9 In view of this disposition, we need not address other matters in the court of appeals' opinion. See n.1, ante.

APPENDIX B

Harold Lindsay De FREECE, Appellant,

v.

The STATE of Texas, Appellee.

No. 08-91-00033-CR.

Court of Appeals of Texas,
El Paso.

Feb. 5, 1992.

Rehearing Overruled March 4, 1992.

Discretionary Review Granted
June 3, 1992.

Before OSBORN, C.J., and WOODARD and KOEHLER, JJ.

OPINION

WOODARD, Justice.

A jury convicted Harold Lindsay De Freece, Appellant, of murder with a deadly weapon, and the trial court assessed punishment at 60 years' confinement in the Texas Department of Criminal Justice. In eight points of error, Appellant seeks review of the trial court's concomitant judgment. We affirm.

Each of Appellant's points of error, allege violations of either the United States Constitution (Points of Error Nos. One, Three, Five and Seven) or the Texas Constitution (Points of

Error Nos. Two, Four, Six and Eight). Points of Error Nos. One and Two argue that the trial court's failure to appoint an expert to assist Appellant in evaluating, preparing and presenting his defense of insanity violated his rights to due process. Similarly, Points of Error Nos. Three and Four assert that the trial court's failure deprived Appellant of equal protection. Points of Error Nos. Five and Six contend that trial counsel was rendered ineffective in presenting Appellant's case due to the lack of expert psychiatric assistance. In Points of Error Nos. Seven and Eight, Appellant argues that the trial court's failure denied him the right of compulsory process. Since Appellant's sole argument under each point is premised entirely upon whether the trial court erred in failing to appoint a psychiatric expert to assist him prior to and at trial, resolution of this issue is dispositive of each of the points of error. As a result, we will address the points simultaneously in that context.

Prior to trial, the State requested that Appellant be examined to determine his competency to stand trial. Within its motion, the State recognized that at the time of the offense, Appellant was under the care of the Eagle Pass Mental Health Mental Retardation Center. In compliance with Tex.Code Crim.Proc.Ann. arts. 46.02 and 46.03 (Vernon 1979), the trial court ordered that a disinterested expert, experienced and qualified in mental health, be appointed to examine Appellant with regard to his competency to stand trial and sanity at the time of the offense. Accordingly, Appellant was psychologically evaluated at the Vernon State Hospital from which voluminous written reports were submitted to the trial court. After a jury found Appellant incompetent to stand trial, he was returned to Vernon State Hospital for restoration. Subsequently, Appellant was found competent to stand trial, and trial on the merits was scheduled.

Prior to trial, Appellant filed Defendant's Motion for Provision of Psychiatric Expert to Assist Defense and for Diagnostic Testing to Prepare Effective Defense which stated that he would pursue an insanity defense. The motion requested

the appointment of an additional, but unspecified, psychiatrist in order to assist defense counsel in trial preparation. In support of his motion, Appellant argued that the United States Supreme Court, in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), stated that due process required appointment of such a psychiatric expert as "a member of the defense team, to serve the defendant's interest in the context of the adversarial system."

On the day Appellant's cause was called to trial, Appellant announced by written motion that he was not ready for trial suggesting that the court's failure to appoint an additional psychiatrist would cause Appellant to be ineffectively assisted by counsel. In re-urging his prior motion based upon *Ake*, Appellant sought support in a United States Supreme Court dissenting opinion in which Justice Marshall, the author of *Ake*, stated the "Texas' provision of a 'disinterested' expert . . . does not satisfy *Ake*." *Granviel v. Texas*, 495 U.S. 963, 110 S.Ct. 2577, 109 L.Ed.2d 758 (1990). Marshall's dissent was in response to the Court's denial of certiorari regarding the Fifth Circuit's opinion in *Granviel v. Lynaugh*, 881 F.2d 185 (5th Cir.1989), *cert. denied*, 495 U.S. 963, 110 S.Ct. 2577, 109 L.Ed.2d 758 (1990). The trial court overruled Appellant's motion.

[1] In his brief, Appellant argues that we must, in accordance with *Ake*, determine whether the State must provide access to an expert who is designated to assist the defense. In short, Appellant requests this Court to declare the Texas statutes inadequate to pass constitutional muster in the appointment of psychiatric assistance to indigents. The Supreme Court has interpreted the due process mandates of the United States Constitution to require that:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State

> must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.
>
> . . . . .
>
> Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right. *Ake*, 470 U.S. at 83, 105 S.Ct. at 1096, 84 L.Ed.2d at 66 (1985).

In *Granviel*, the Fifth Circuit noted that the accused's "ability to uncover the truth concerning his sanity is not prejudiced by a court-appointed, neutral expert."[1] 881 F.2d at 192.

Texas law requires that when "the issue of the defendant's incompetency to stand trial is raised . . .," Tex.Code Crim.Proc.Ann. art. 46.02, § 3(a), or when "notice of intention to raise the insanity defense is filed," *Id.* at art. 46.03, § 3(a), "the court may, . . . appoint disinterested experts experienced and qualified in mental health and mental retardation to examine the defendant . . ." with regard to either competency to stand

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1. The Court also noted that "[t]he state is not required to permit defendants to shop around for a favorable expert." 881 F.2d at 192. Likewise, the Supreme Court noted that indigent defendants have no "constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Ake*, 470 U.S. at 83, 105 S.Ct. at 1096, 84 L.Ed.2d at 66 (1985). *See also Day v. State*, 704 S.W.2d 438, 440 (Tex.App.--Amarillo 1986, no pet.).

trial or sanity at the time of the offense. Tex.Code Crim.Proc.Ann. arts. 46.02 and 46.03, respectively. Each statutory provision also instructs the expert examiners to be prepared to testify regarding their examination of the accused. In *Granviel*, the Court found that "[t]he Texas procedure complies with the mandate of the Constitution." *Id.* at 192. In denying certiorari, a majority of the Supreme Court deemed it unnecessary to disturb the lower court's ruling. As an intermediate appellate court, we are in no position to contradict the highest court of the land, and we find the Texas statutory scheme constitutionally adequate.

[2] We further find that the facts of the instant case also command that Appellant received ample expert examination and assistance. The trial court ordered examination of both Appellant's competence to stand trial and sanity at the time of the offense. Pursuant to the statutes, the court advised the mental health facility that Appellant had been charged with a homicide which occurred on February 17, 1989. The court also enunciated the legal definition of competency to stand trial, and the order requested that Appellant be examined to determine whether or not, due to mental disease or defect, he knew his conduct was wrong. After the initial examination, Appellant was declared incompetent to stand trial. However, the director of psychiatric services at [V]ernon State Hospital recommended that Appellant be committed to the hospital for treatment and restoration pursuant to Tex.Code Crim.Proc.Ann. art. 46.02, § 5 (Vernon 1979 and Supp. 1991).

After a jury found Appellant presently incompetent but possessing the capability to attain competence, the trial court ordered Appellant committed to a mental health facility for individual treatment for 18 months. The court instructed that the Appellant's examiners were to notify the court as soon as they were of the opinion that he had attained competency or if there was no substantial probability that competency to stand trial could be attained. Reports were submitted to the trial court on December 7, 1989 and March 12, 1990, both of which stated

Appellant had yet to attain competence. Subsequently, the director of psychiatric services reported on June 1, 1990, that Appellant had attained competency to stand trial. Throughout the process, numerous lengthy reports were filed by experts who examined Appellant including: Denicia Martinez, M.D.; Fini E. Heynen, Ph.D.; William Swart, D.O.; and Danny Slappey.

At trial, Appellant testified on his own behalf and introduced numerous hospital records to attempt to prove his insanity at the time of the offense. Appellant detailed his youth, his military history, a previous marriage, his Christian conversion, his prolonged drug abuse and his past mental health problems, including the medications prescribed to alleviate his mental problems. He stated that while he saw "visions," he was not "crazy." On the day of the offense, Appellant took his medication and smoked some marihuana prior to attempting to catch up with his wife (the deceased) and her family who were driving from Eagle Pass to Pecos. Appellant testified that he was afraid that they were going to Pecos to attempt to sell an infant child belonging to him and his wife. Appellant took some more medicine and smoked some more marihuana prior to starting his own fateful trip toward Pecos. Stating that all he wanted to do was get his baby, Appellant testified that he drove for a couple of hours prior to catching up with the family and that he had heard voices that he could not overcome that told Appellant to "kill, kill." When Appellant caught up with the family, he ran their vehicle off the road, and when the family exited the vehicle, the deceased approached Appellant with the child. Appellant stabbed her with a knife repeatedly and cut her throat prior to fleeing on foot. Appellant was apprehended approximately twenty-four hours later about a mile from the scene of the murder. On cross-examination, Appellant admitted that the effect of taking his medicine and smoking marihuana "triggered me off, . . . that's when it really, you know, it changed me."

After cross-examination of Appellant concluded, the defense rested; at which time, both the State and the court

offered to allow Appellant to visit with Dr. Heynen prior to the State's calling her as a rebuttal witness. Stating that "[w]e don't want to put any more witnesses," [sic] Appellant declined the invitation. Dr. Heynen, a licensed clinical psychologist, testified that she examined Appellant to ascertain both whether he was competent to stand trial and whether he was sane at the time of the offense. In so doing, she stated that the courts always ask for two opinions; therefore, Dr. Martinez, a psychiatrist, also evaluated Appellant's condition. The witness stated that she reviewed previous reports on Appellant's condition, observed Appellant extensively and administered a battery of tests to evaluate Appellant. From the information assembled, Heynen stated that on February 17, 1989, Appellant "did know the difference between right and wrong." Continuing, Heynen testified that Appellant was neither psychotic, nor did he suffer from delusions or hear voices sufficient to cause him to be confused to the point that he would not understand what was happening or know right from wrong. After the State passed the witness, the court admonished and excused the jury for the evening. the trial court also inquired of Dr. Heynen whether she would be available to consult with Appellant's attorney about his client's case to which she affirmatively responded.

When the trial reconvened on the following morning, Appellant cross-examined Dr. Heynen. During the examination, Appellant obtained a hearing outside presence of the jury, and Appellant's counsel told the trial court that "the defendant has had an opportunity to talk with the doctor who is on the stand and to review the records that we have just talked about in the direct testimony." Immediately thereafter, Appellant renewed his pretrial motions to obtain "expert assistance in analyzing that material and preparing for cross-examination. . . ." The court inquired whether Appellant needed additional time to talk to Dr. Heynen to which Appellant replied in the negative. Consequently, the trial court again overruled the motion. Appellant continued to argue to no avail that his need for an additional expert was to be able to understand the extensive

medical records in order to effectively cross-examine Dr. Heynen and point out where she was wrong.

As cross-examination continued, Appellant did effectively elicit testimony from the witness that Dr. Martinez diagnosed Appellant as suffering from chronic undifferentiated schizophrenia, organic brain syndrome and extreme psychosocial stressors. She also agreed that Appellant did in fact suffer from diffuse organic brain damage. Heynen admitted that she and Dr. Martinez disagreed about whether Appellant had schizophrenia. Appellant also produced evidence that prior to the offense, another psychiatrist employed at the San Antonio State Hospital reported that "he sees the capacity of Mr. DeFreece to decompensate and to be a danger to himself and others because of the stress." Heynen stated that Appellant exaggerated his problems due to a character disorder and his drug dependence. In qualifying why she believed Appellant did not suffer from auditory or visual hallucinations to the extent that he would be compelled to carry them out, Heynen stated that most of Appellant's prior admissions to mental health facilities resulted from his illicit drug abuse and that any hallucinations were likely organically induced by such drug use. However, she also stated that a person who had been forced to kill women and children in battle such as in a Vietnamese village could later suffer from posttraumatic stress syndrome possibly causing a reoccurrence.

As a result, we find that Appellant's counsel did an admirable job of cross-examining Dr. Heynen and introducing evidence before the jury from which it could decide whether or not Appellant knew the difference between right or wrong on the date of the offense. As was their prerogative, the jury determined from the evidence both pro and con that Appellant had not established by a preponderance of evidence that he was not legally sane when he killed his wife. Having found that: (1) the Texas statute adequately provides for indigent psychiatric assistance; (2) the trial court did appoint disinterested experts as per the statute; and (3) Appellant's trial counsel effectively impeached the testifying expert, we cannot agree that the trial

court erred in failing to appoint an additional expert to assist Appellant. *See generally, Meraz v. State*, 714 S.W.2d 108, 115-16 (Tex.App.--El Paso 1986), *aff'd*, 785 S.W.2d 146 (Tex. 1990); *Granviel*, 881 F.2d at 192; and *Henderson v. Dugger*, 925 F.2d 1309, 1315-16 (11th Cir.1991).

Furthermore, the record does not indicate any reason why Dr. Martinez was neither requested nor subpoenaed to testify. We are unaware of any prohibitive reason which would have prevented Appellant from simply issuing his own subpoena to compel Martinez's presence along with Heynen's. *See* Tex.Code Crim.Proc.Ann. art. 24.03 (Vernon 1989). This would have enabled Appellant to put on direct evidence from Martinez's diagnosis which appears to contradict Heynen's. While presentation of such evidence would have likely bolstered Appellant's position, accomplishing this feat did not require the appointment of an additional expert since Martinez was already one of those previously appointed.

We find that the trial court properly appointed the disinterested experts and admittedly allowed sufficient time for Appellant to interview the one expert subpoenaed to testify. During the time provided, Appellant could have inquired into any matter of medical importance which he did not understand. It is firmly established that Appellant is not entitled to "appointment of an expert who would reach a conclusion favorable to the defendant. . . . " *Martin v. Wainwright*, 770 F.2d 918, 935 (11th Cir. 1985), *cert. denied*, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986); *Granviel*, 881 F.2d at 192.[2] While Appellant claims that he is only seeking appointment of an adversarial expert, he fails to recognize that the trial court had done so, and one of the court's disinterested experts did in fact possess opinions supportive of his position. However, nothing

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2. *See also Day v. State*, 704 S.W.2d 438, 440 (Tex.App.--Amarillo 1986, no pet.) (trial court properly denied accused opportunity to "shop for another opinion" after previously appointing disinterested expert).

in the record affirmatively shows Appellant issued or requested issuance of process to compel attendance of Dr. Martinez who had been previously instructed by the court that the evaluation of Appellant might be the subject of testimony in court. Consequently, the trial court did not err in overruling Appellant's motion for appointment of an additional expert.

As a result, we conclude that Appellant was not deprived of either due process, equal protection, effective assistance of counsel or compulsory process of witnesses.[3] Accordingly, we overrule each of Appellant's points of error and affirm the judgment of the trial court.

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3. We recognize the Court of Criminal Appeals mandate that allegations of state constitutional violations are to be analyzed independent of federal constitutional issues. *Heitman v. State*, 815 S.W.2d 681, 690 (Tex.Crim.App.1991). However, Appellant has not cited any specific precedential authority addressing his individual points of error which would require us to apply a different or higher standard in reviewing those points. Consequently, we find no compelling reason to deviate from the standard of review expressed by the Supreme Court in *Ake*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). *See also generally, Jordan v. State*, 707 S.W.2d 641, 645 (Tex.Crim.App. 1986) (failure to order medical examination did not deny accused due process or effective representation).

ORIGINAL

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FILED
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No. 92-1882

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE STATE OF TEXAS,
Petitioner

v.

HAROLD LINDSAY DEFREECE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

MARK STEVENS
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Counsel for Respondent

QUESTION PRESENTED

Did the Texas Court of Criminal Appeals correctly hold that an indigent accused, who has a substantial history of mental impairment and whose sole defense is insanity, is entitled under Ake v. Oklahoma, 470 U.S. 68 (1985), to appointment of a psychological expert to assist in the evaluation, preparation, and presentation of his defense, rather than the "disinterested" expert provided by Texas law?

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No. 92-1882

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE STATE OF TEXAS,
Petitioner

v.

HAROLD LINDSAY DEFREECE,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Harold Lindsay DeFreece, respondent, by and through his attorney of record, and files Respondent's Brief in Opposition to the Petition for Writ of Certiorari filed by the State of Texas.

OPINIONS BELOW

The respondent Harold Lindsay DeFreece respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Texas Court of Criminal Appeals' opinion in this case. That opinion is reported at 848 S.W. 2d 150 (Tex. Crim. App. 1993), and is attached as Appendix A.

JURISDICTION

Petitioner has invoked this Court's jurisdiction to review the judgment of the Texas Court of Criminal Appeals pursuant to 28 U.S.C. § 1257. Respondent's Brief in Opposition is filed on or before September 10, 1993, as requested by the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 46.03 § 3 of the Texas Code of Criminal Procedure provides, in pertinent part:

> (a) If notice of intention to raise the insanity defense is filed under Section 2 of this article, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health and mental retardation to examine the defendant with regard to the insanity defense and to testify thereto at any trial or hearing on this issue.
>
> * * *
>
> (d) A written report of the examination shall be submitted to the court within 30 days of the order of examination, and the court shall furnish copies of the report to the defense counsel and the prosecuting attorney.

> The report shall include a description of the procedures used in the examination and the examiner's observations and findings pertaining to the insanity defense. The examiner shall also submit a separate report setting forth his observations and findings concerning:
>
> (1) whether the defendant is presently mentally ill and requires court-ordered mental health services; or
>
> (2) whether the defendant is a mentally retarded person as defined in the Mentally Retarded Persons Act of 1977 (Article 5547-300, Vernon's Texas Civil Statutes).
>
> * * *

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner asks that its petition "be granted to clarify the holding of Ake v. Oklahoma . . . and resolve a substantial conflict among the circuits and state courts of last resort." [Petition, p. 7] In fact, there is no need to clarify Ake, and there is no substantial conflict among the courts. Nor are there any other "special and important reasons" for granting this petition. See S. Ct. R. 10.1. Accordingly, the petition should be denied.

I.

AKE CLEARLY MANDATES APPOINTMENT OF AN ASSISTING EXPERT

In this case, the Texas Court of Criminal Appeals relied on Ake v. Oklahoma, 470 U.S. 68 (1985), to hold that due process required the appointment, not of a "disinterested" psychological expert who would report to the court, the prosecution and the defense, but rather, an expert who would assist Mr. DeFreece in the

evaluation, preparation and presentation of his defense. DeFreece v. State, 848 S.W. 2d 150, 160 (Tex. Crim. App. 1993).

Petitioner challenges this holding, asserting that it is unclear whether Ake requires the appointment of an assisting expert in cases such as Mr. DeFreece's. According to the petitioner, certiorari should be granted to "clarify" Ake.

Petitioner errs in arguing that Ake is unclear. That case plainly requires the appointment of a psychological expert to assist in the evaluation, preparation and presentation of the defense. And, the overwhelming number of courts and scholarly commentators who have considered the matter agree.

A.

Ake Is Clear On Its Face

The simplest and most complete answer to the state's charge that Ake does not clearly require an assisting expert is found in the text of that opinion. Ake begins by noting that the defendant must have a "fair opportunity to present his defense." Id. at 76(emphasis supplied). The Constitution requires that indigents have meaningful access to justice; "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process." Thus, "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Id. at 77(emphasis supplied). Psychiatric assistance "may well be crucial to the defendant's ability to marshal his defense. Id. at 81(emphasis

supplied). Given the inexactitude of the science of psychiatry, it is often necessary for juries to "resolve differences in opinion within the psychiatric profession on the basis of evidence offered by each party. Id. at 81(emphasis supplied). "[P]sychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them." Id(emphasis supplied). Accordingly, due process requires "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Id. at 83(emphasis supplied). "[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination." Id. at 82(emphasis supplied). Psychiatric witnesses "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." Id. at 81(emphasis supplied). Finally, the Court noted that Mr. Ake "was denied the means of presenting evidence to rebut the State's evidence of his future dangerousness." Id. at 83. "Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions

about the State's proof of an aggravating factor." Due process requires psychiatric assistance where "the relevance of responsive psychiatric testimony [is] so great. . . ." Id. at 84(emphasis supplied).

In light of the emphasized language, no credible argument can be made that Ake is unclear. When a psychological expert is required, that expert must assist the defendant in evaluating, preparing and presenting the defense to the jury. A "disinterested" expert cannot do so. Certiorari is not needed to clarify Ake.

B.

A Review Of The Cases Reveals No Problem With Understanding Ake

If petitioner is correct that Ake is unclear, the logical place for this unclarity to manifest itself would be in opinions by the lower courts. In fact, as DeFreece recognized, the case law is virtually unanimous in interpreting Ake to require an assisting expert.

For example, this precise question was decided in Cowley v. Stricklin, 929 F. 2d 640 (11th Cir. 1991). There, the trial court appointed a Dr. Habeeb, who reported to the court, the prosecution and the defense. The court refused petitioner's repeated requests for psychiatric assistance in the preparation of a defense. Id. at 641. This was error.

> The district court found that Dr. Habeeb was a "qualified," "independent psychiatrist." This may have been the case, but Dr. Habeeb did not provide the constitutionally requisite assistance to Cowley's defense. Ake holds

> that psychiatric assistance must be made available for the defense. This assistance may include conducting "a professional examination on issues relevant to the defense," presenting testimony, and assisting "in preparing the cross-examination of a State's psychiatric witnesses." Dr. Habeeb performed none of these essential tasks on Cowley's behalf. Dr. Habeeb was called by the prosecution and testified against Cowley at both the competency hearing and the trial. His testimony was that he had examined Cowley and found him to be competent and that Cowley showed no signs of schizophrenia or other evidence of insanity at the time of the crime. Dr. Habeeb did not assist in Cowley's trial preparation and obviously could not have assisted Cowley in his own cross-examination.

Id. at 644(emphasis in original).

Other cases, decided both before and after Ake, have reached the same conclusion: An indigent defendant in whose case insanity is a significant factor is entitled to an expert to assist in the evaluation, preparation, and presentation of the defense. E.g., Terry v. Rees, 985 F. 2d 283, 284 (6th Cir. 1993); Liles v. Saffle, 945 F. 2d 333, 340 (10th Cir. 1991); Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990); United States v. Crews, 781 F. 2d 826, 834 (10th Cir. 1986); United States v. Sloan, 776 F. 2d 926, 929 (10th Cir. 1985); United States v. Chavis, 486 F. 2d 1290, 1292 (D.C. Cir. 1973); Marshall v. United States, 423 F. 2d 1315, 1319 (10th Cir. 1970); Lindsay v. State, 330 S.E. 2d 563, 567 (Ga. 1985); Palmer v. State, 486 N.E. 2d 477, 482 (Ind. 1985); State v. Gambrell, 347 S.E. 2d 390, 395 (N.C. 1986).

C.

Scholarly Commentary Overwhelmingly Supports The Right To An Assisting Expert

Much scholarly commentary has been generated on this subject, and the overwhelming bulk of it rejects the notion that a neutral expert can satisfy Ake and the Constitution. Representative is the following remark:

> If in these cases the defendant's right to participate in the adversary process is to have meaning, the defendant must have the opportunity not only to ascertain the opinion of an expert, but also to work with the expert in the assessment and exposure of shortcomings in the testimony of experts for the prosecution.

Showalter & Fitch, Objectivity and Advocacy in Forensic Psychiatry After Ake v. Oklahoma, 15 J. Psychiatry & L., 177, 183 (1987) (emphasis supplied); see Comment, Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-Ake Criminal Justice System, 3 Emory L.J. 995, 1008 (1989); Dubia, The Defense Right to Psychiatric Assistance in Light of Ake v. Oklahoma, Army Law., Oct. 1987, at 15, 21-22; Note, Ake v. Oklahoma: A Question of Experts, 12 Okla.City U.L.Rev. 385, 413 (1987); Note, Psychiatric Assistance for Indigent Defendant's Pleading Insanity: The Michigan Experience, 20 U.Mich.J.L.Reform 907, 915 (1987); Note, After Ake: Implementing the Tools of an Adequate Defense, 7 Pace L.Rev. 201, 239-240 (1986); Note, Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma, 84 Mich.L.Rev. 1326, 1346-1355 (1986); Note, The Right to a Partisan Psychiatric Expert: Might Indigency

Preclude Insanity?, 61 N.Y.U.L.Rev. 703, 725 (1986); Note, The Supreme Court: Leading Cases, 99 Harv.L.Rev. 120, 136 (1985); Note, Fourteenth Amendment -- Due Process and an Indigent's Right to Court-Appointed Psychiatric Assistance in State Criminal Proceedings, 76 J.Crim.L.& Crim. 1065, 1077 (1985); Note, Due Process and Psychiatric Assistance: Ake v. Oklahoma, 21 Tulsa L.J. 121, 154 (1985).

II.

CONTRARY TO WHAT THE PETITIONER ASSERTS, THE AUTHORITY CONFLICTING WITH DEFREECE IS INSUBSTANTIAL

The Texas Court of Criminal Appeals noted that "[e]very court that has found the defendant did make an adequate showing that insanity would be a significant factor, however, has also held that Ake entitled him to more than an examination and testimony, if favorable, from a neutral psychiatric expert -- every court, that is, except the Fifth Circuit in Granviel v. Lynaugh, supra." DeFreece v. State, 848 S.W. 2d 150, 157 (Tex. Crim. App. 1993).

Petitioner, on the other hand, asserts that "there in fact exists a diversity of opinion so great that this Court should grant review to clarify what Ake requires." [Petition, p. 7] In support of this bold assertion, petitioner then specifically discusses only two cases -- State v. Hoopii, 710 P. 2d 1193 (Ha. 1985) and Djadi v. State, 528 A. 2d 502 (Md. Ct. Spec. App. 1987). [Petition, p. 8-9]

The court of criminal appeals distinguished both cases, finding that there the Ake claims had been denied because the defendants had not shown that insanity would be a significant

factor at trial. DeFreece v. State, 848 S.W. 2d 156. That is, since the defendants in those cases were not entitled to any experts at all, those courts did not need to decide whether they were entitled to assisting experts. Hoopii and Djadi do not conflict with DeFreece because they are not in point.

As noted, the court below found only a single case inconsistent with its holding: Granviel v. Lynaugh, 881 F. 2d 185 (5th Cir. 1989), cert. denied, 110 S.Ct. 2577 (1990). There, the federal court of appeals rejected defendant's challenge to the Texas statute, finding that the sole purpose of a psychiatric examination is to enable an expert to form an opinion about the defendant's mental capacity. Accordingly, since the ability of the neutral expert to discover the truth about sanity was not compromised, there was no error. Id. at 191-92.

Respectfully, the analysis in Granviel misses the point. Even assuming the sole purpose of an examination is to determine sanity, Ake very plainly declares that examination is not the sole function of the appointed expert. Rather, the expert must also assist in the evaluation, preparation, and presentation of the defense. The Granviel court made no effort to address this additional function, and this omission was the source of its error.

Thus, while Granviel is inconsistent with DeFreece, it is also inconsistent with the other post-Ake cases which have decided this issue. Considering the weight of authority, petitioner is wrong to categorize this as a "substantial" conflict. Far from substantial, Granviel should be viewed as aberrational. The conflict, such as

it is, is not special or important enough to warrant certiorari.

III.

THERE ARE NO IMPORTANT POLICY OR COMITY CONSIDERATIONS MILITATING AGAINST THE DECISION BELOW

The petitioner argues in favor of a bright-line rule which would require only that a disinterested expert be provided to examine the defendant and consult with the defense. [Petition, p. 11] While such a bright-line rule may or may not be easy to apply, as we have shown, it is simply not consistent with the plain language of Ake.

Nor is there any support in the record for the assertion that the rule mandated by Ake and DeFreece "invites confusion by spawning numerous subsidiary issues." [Petition, p. 11] In fact, these so-called subsidiary issues are no more than ruminations by the state.

A.

DeFreece Will Not Open The Floodgates To Multiple Experts, Or To Claims Of Ineffective Assistance Of Counsel

First, petitioner wonders whether the defense might be entitled to another expert if the assisting expert is not "in complete agreement with the diagnosis of the first expert and is unable 'to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts.'" [Petition, p. 11] This concern, of course, was addressed, and negated, in Ake itself, where the Court declined to hold that an indigent defendant "has a constitutional right to choose a psychiatrist of his personal liking." Ake v. Oklahoma,

470 U.S. 83. Ake does not countenance multiple experts. Mr. DeFreece did not request multiple experts, but instead sought only an expert, expressly disavowing the right to choose anyone in particular. [R.IIb--4; Tr.--74-75] And, the court below specifically relied upon the fact that counsel "did not request a particular psychiatrist, but only a single competent one." DeFreece v. State, 848 S.W. 2d at 160. Petitioner's expressed concern is without foundation.

Second, the petitioner asks whether the assisting expert's "failure to undermine the testimony of the state's expert [will] result in a finding of ineffective assistance sufficient to constitute reversible constitutional error?" [Petition, p. 11-12] The fallacy of this concern is easily exposed. Presently, a non-indigent defendant is entitled to hire as many experts as he can afford who will work as members of the defense team. Petitioner, however, cites not a single case in which the courts have attributed the ineffectiveness of retained experts to counsel so as to cause a Sixth Amendment violation. If such cases do exist at all, their number is indeed very small. If ineffective experts have spawned no spate of litigation in the non-indigent arena, why would such litigation be any more frequent simply because the expert in question is appointed by the court to assist an indigent defendant? Cf. Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)(defendants who retain their lawyers are entitled to the same Sixth Amendment protection as those whose lawyers are appointed). Again, petitioner's concern is a non-issue.

B.

Neither The Evidence Nor Common Sense Supports Petitioner's Attempt to Raise The Financial Spectre

Next, petitioner asks the Court to consider "how the state's fisc might be affected," asserting that "it cannot be gainsaid that the state will suffer a substantial, additional economic burden if the opinion below is allowed to stand uncorrected." [Petition, p. 12] This argument is no more persuasive now than it was when this Court rejected it in Ake. Ake v. Oklahoma, 470 U.S. at 78. Moreover, there is absolutely no evidence whatsoever in this record of any "substantial, additional economic burden" to be suffered by the state if an assisting expert were to be appointed when insanity is shown to be a significant factor at trial. Significantly, after Ake was decided, Texas enacted legislation authorizing payment to court appointed counsel "for reasonable expenses incurred with prior court approval for purposes of investigation and expert testimony . . . ." See Tex. Code Crim. Proc. Ann. art. 26.05(a)(Vernon 1989). See also 18 U.S.C. § 3006A(e). This legislation hardly comports with petitioner's expressed fear of dire economic consequences. Finally, there is no reason to believe that any of the other jurisdictions which have found Ake to require the appointment of an assisting expert have experienced any substantial economic burden such as might outweigh an indigent defendant's right to due process of law.

C.

Mr. DeFreece Did Not Forfeit His Right To An Assisting Expert

The final "policy" point made by the petitioner is that Mr.

DeFreece somehow forfeited his right to an assisting expert when his counsel refused the trial court's invitation, on the eve of cross-examination, to interview Dr. Heynen, and when he did not subpoena Dr. Martinez. [Petition, p. 12] Neither argument is persuasive.

The state tends to fault counsel for not subpoenaing Dr. Martinez, a psychiatrist also on the staff of Vernon State Hospital. Initially, we note that the assertion that Dr. Martinez possessed opinions "supportive of his insanity defense" is considerably overstated. There is no evidence that Dr. Martinez believed Mr. DeFreece legally insane. At most, the record shows that he had once found him to suffer from schizophrenia, chronic, undifferentiated type, and an organic brain syndrome, and severe psychosocial stressors. [R.VI--17, 20]

More significantly, even if this Court could properly assume something completely unsupported by the record -- that if subpoenaed Dr. Martinez would have testified that Mr. DeFreece was legally insane -- this would not cure the constitutional problem in our case. Ake makes it clear that expert assistance is required not only for purposes of testifying, but also for assisting in the evaluation, preparation and presentation of the defense. Specifically, Ake guarantees assistance "to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." Ake v. Oklahoma, 470 U.S. at 82. It is constitutionally insignificant that counsel might have subpoenaed

Dr. Martinez to testify at trial, because this still would have left him unassisted in evaluating, preparing and presenting the defense. This is exactly what the Texas Court of Criminal Appeals found below. DeFreece v.State, 848 S.W. 2d at 160.

After Dr. Heynen testified for the state, the court offered counsel the opportunity to interview her, before cross-examination. Petitioner is incorrect in suggesting that this eliminated any error under Ake. Mr. DeFreece was guaranteed expert assistance in the evaluation, preparation, and presentation of his defense. Permitting counsel a mid-trial interview contributes little if anything to these goals. Indeed, counsel explained at trial exactly why the offered interview was of no use. "Your Honor, my greatest need is to be able to impeach her testimony and to discredit it, and of course, she's not available for that. That's what I need for cross examination, so I see no benefit in talking to her." "My problem is to point out where she's wrong, Your Honor. I don't believe she's available for that." [R.V--8-9]

No amount of interviewing Dr. Heynen would provide him with that which Ake and due process guarantee -- expert assistance in evaluating, preparing, and presenting the defense. Since she worked for all parties, disinterestedly, she necessarily could not help Mr. DeFreece "marshal his defense." In particular, since she was the state's witness, she was singularly unable "to assist in preparing the cross-examination of a state's psychiatric witness," or to suggest "the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." Ake v.

Oklahoma, 470 U.S. at 81-82. Nor could she "offer a well-informed expert's opposing view," or "responsive psychiatric testimony." Id. at 84. Since Dr. Heynen was incapable in this case of rendering the kind of assistance contemplated by Ake, it is illogical to argue that Mr. DeFreece forfeited his right to due process by declining a mid-trial interview.

IV.

THE PRESENT CASE PROVES THE WISDOM OF AKE

A central purpose of Ake was to minimize the "risk of error." Ake v.Oklahoma, 470 U.S. at 79. Because psychiatry is not an exact science, it is often necessary for jurors to resolve evidentiary disputes where sanity is at issue. Id. at 81. This Court reached the general "conclusion that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high." Id. at 82(emphasis supplied).

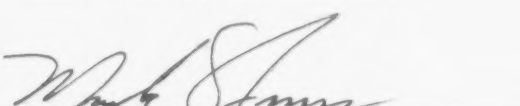
The truth of this general observation is vividly borne out in our case. The court-appointed expert was the only expert witness to testify, and she was called by the state. Her area of expertise was outside that of Mr. DeFreece's counsel. Her testimony was based in part on voluminous written psychiatric records. Although she herself was unequivocal, she did admit that other professionals at the Vernon State Hospital had diagnosed Mr. DeFreece as more

disabled than she. These other experts were, in her unilateral opinion, less-qualified than she, and apparently, wrong. [R.V--20-21] Without an assisting expert, counsel had no one to counter the testimony of Dr. Heynen. More importantly, he had no one to help him determine the viability of his defense, or to help him present his defense, or to help him prepare to cross-examine Dr. Heynen. In such a case, just as foreshadowed by Ake, "the risk of an inaccurate resolution of sanity issues is extremely high." Id. The sort of expert delineated in Ake would have constitutionally minimized this risk of error. The "disinterested" expert appointed by the court did not. The Texas Court of Criminal Appeals was correct to find that this violated Mr. DeFreece's right to due process of law.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted:



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No. 92-1882

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE STATE OF TEXAS,
Petitioner

v.

HAROLD LINDSAY DEFREECE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

CERTIFICATE OF SERVICE

I, Mark Stevens, a member of the bar of this Court, hereby certify that on this the 9th day of September, 1993, one copy of the Respondent's Brief in Opposition was mailed, first class, postage prepaid to Mr. Charles A. Palmer, Assistant Attorney General for the State of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711, counsel for petitioner herein. I further certify that all parties required to be served have been served.

MARK STEVENS

discretionary review unless such a finding is necessary to the disposition of questions presented to this Court. Tex. Const. Art. 5 § 6; *See Arcila v. State, supra; Gipson v. State*, 844 S.W.2d 738 (Tex.Crim.App.1992) (Benavides, J., concurring). The determination of harm, if any, should be left for the Court of Appeals. Therefore, the judgment of the Court of Appeals is vacated and the cause remanded to that court for further consideration consistent with this opinion.

McCORMICK, P.J., concurs in the result.

Harold Lindsay DE FREECE, Appellant,

v.

The STATE of Texas, Appellee.

No. 502-92.

Court of Criminal Appeals of Texas, En Banc.

Feb. 24, 1993.

Defendant was convicted of murder with deadly weapon following jury trial by the 63rd District Court, Terrell County, George Thurmond, J. Defendant appealed. The El Paso Court of Appeals, 829 S.W.2d 251, affirmed. Defendant petitioned for discretionary review. The Court of Criminal Appeals, Clinton, J., held that: (1) due process entitled defendant to appointment of psychiatrist to provide technical assistance after determination that insanity would be significant factor at trial; (2) fact that defense counsel was able to cross-examine state witness without psychiatric assistance did not make error harmless; and (3) subpoenaing treating psychiatrist to testify at trial did not satisfy defendant's due process rights.

Reversed and remanded.

McCormick, P.J., concurred in result.

White, J., dissented.

1. Constitutional Law ⇐268.2(3)

Due process requires appointment of psychiatrist to provide technical assistance to accused, to evaluate strength of accused's defense, to offer expert diagnosis at trial favorable to defense, and to identify weaknesses in state's case where defendant's sanity is significant factor at trial. U.S.C.A. Const.Amends. 5, 14; Vernon's Ann.Texas C.C.P. art. 46.03.

2. Costs ⇐302.4

That murder defendant's insanity was significant factor at trial, entitling defendant to psychiatrist to assist in preparation and presentation of case, was established where acts of offense were fairly bizarre, state questioned defendant's sanity and competency to stand trial, defendant was in fact found to be incompetent to stand trial, treating psychiatrist believed defendant to be a schizophrenic, and defendant had significant history of commitment in mental health facilities. Vernon's Ann.Texas C.C.P. art. 46.03; U.S.C.A. Const.Amends. 5, 14.

3. Criminal Law ⇐1166(1)

Even if harmless error analysis applied, failure to appoint psychiatrist to assist murder defendant in preparing defense was not harmless where assistance of expert to interpret voluminous medical records could have assisted defense counsel in cross-examining state witness, only contested issue at trial was sanity, and jury deliberated for five hours before convicting defendant. Vernon's Ann.Texas C.C.P. art. 46.03; U.S.C.A. Const.Amends. 5, 14.

4. Constitutional Law ⇐268.2(3)
Costs ⇐302.4

Right to subpoena treating psychiatrist who diagnosed defendant as having schizophrenia did not satisfy defendant's due process right to have expert assistance in preparing defense; psychiatrist was not present to help counsel interpret hospital records or examine conclusions of state's expert for purposes of cross-examination.

Appendix A

Vernon's Ann.Texas C.C.P. art. 46.03; U.S.C.A. Const.Amends. 5, 14.

Mark Stevens, San Antonio, Martin Underwood, Comstock, for appellant.

Thomas F. Lee, Dist. Atty., Del Rio, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

CLINTON, Judge.

Appellant was convicted by a jury of the offense of murder and his punishment assessed by the trial court at 60 years confinement in the penitentiary. On appeal he argued that the trial court erred in failing to appoint an expert to assist him in evaluation, preparation, and presentation of his insanity defense, in violation of his constitutional rights to due process, equal protection, effective assistance of counsel and compulsory process. The Eighth Court of Appeals disagreed, holding, *inter alia*, that appellant received all the expert assistance he was constitutionally entitled to under the provisions of Article 46.03, § 3, V.A.C.C.P. *De Freece v. State*, 829 S.W.2d 251 (Tex.App.—El Paso 1992). In his petition for discretionary review appellant reiterates his claim that under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), he was entitled to more than just the "disinterested experts" provided for by Article 46.03, § 3, supra. We granted the petition to address this claim. Tex.R.App.Pro., Rule 200(c)(2).

I.

Appellant and the deceased, Juanita Rodriguez, had a five month old son. On the morning of February 17, 1989, appellant went to the home of Juanita's parents in Eagle Pass, where she and the baby were staying. Appellant was told by Juanita's sister that Juanita and her parents and brother had left that morning to drive to Pecos. Based upon statements he claimed Juanita's mother had made on prior occasions, appellant decided that the group intended to sell the baby in Pecos, and set out after them. He caught up with them on Highway 90 between Dryden and Sanderson, and ran them off the road. According to his testimony, at this time appellant heard voices he "couldn't overcome" which commanded him to "kill, kill." He forced Juanita into his car, where he stabbed her numerous times in the chest and abdomen, and then cut her throat. Texas Rangers apprehended him the next day a mile from the scene, and he readily confessed. The grand jury indicted him on March 20, 1989.

On June 23, 1989, the State filed a motion requesting that appellant be examined both for competency to stand trial and sanity at the time of the offense. Pursuant to Articles 46.02 and 46.03, V.A.C.C.P., the trial court ordered appellant sent to Vernon State Hospital "for observation, examination and treatment." There, Dr. D.F. Martinez, a psychiatrist, diagnosed him as suffering from "Schizophrenia, Chronic, Undifferentiated Type." Dr. F.E. Heynen, a clinical psychologist, opined that appellant was incompetent to stand trial, but that at the time of the offense he "had substantial capacity to appreciate the wrongfulness of his behavior and understood that his behavior was unlawful." On September 11, 1989, a jury found appellant presently incompetent, but capable of attaining competency in the foreseeable future; judgment to that effect was entered on September 13, 1989. Accordingly, appellant was returned to Vernon State Hospital, where he was re-evaluated every ninety days. See Article 46.02, §§ 4(g) & 5(c), supra. On December 7, 1989, and again on March 12, 1990, the hospital reported that appellant had not yet attained competency, apparently on recommendations from Dr. Martinez. Finally, on June 1, 1990, the trial court was notified that appellant was competent to stand trial, although Dr. Martinez advised that "he should continue his present medications consisting of neuroleptics and antidepressants."

On August 20, 1990, counsel for appellant filed a motion requesting the appointment of a psychiatric expert to assist in

preparing and presenting his insanity defense. The trial court took the motion under advisement. On September 18, 1990, counsel filed another motion urging his incompetency to try the case without expert assistance, and essentially requesting a continuance. A hearing was held during which counsel for appellant argued that the trial court had misconstrued his August 20 motion as a request for a specific expert. Counsel clarified that he sought no particular expert, but simply any competent psychiatrist who:

> "would be a member of the defense team, would be available for helping preparation of the case, preparation for cross examination, deciding which tests were needed, range and form, that sort of thing, as well as being present during trial to help the defendant."

The trial court stated, *inter alia*, that "I've already appointed a psychiatrist to conduct an evaluation, and I don't feel I have to appoint another one[.]" Instead, the court assured appellant's counsel that he would be afforded an opportunity to interview Dr. Heynen, who was scheduled to testify for the State, prior to cross-examining her. Counsel for appellant complained that he

> "[did] not believe the ability to speak to this one doctor solves the problem, because number one, she's already on record in writing as supporting the State's position, and number two, she will give no assistance in how to cross-examine her . . . We think that we still need the expert on the defense team."

The trial court denied both appellant's motions.

Trial commenced that same day. Other than his testimony that he had heard voices commanding him to "kill, kill," appellant presented no direct evidence to show he was insane at the time of the offense. In rebuttal the State put Dr. Heynen on the witness stand to testify that any voices appellant may have heard would not be "sufficiently compelling to cause him to forget that this was a wrongful thing to do." After reading a number of reports from other clinics, conducting a battery of tests, and consulting with other staff members at Vernon State Hospital, she concluded that appellant had known the difference between right and wrong when he committed the offense. See V.T.C.A. Penal Code, § 8.01. After this testimony the trial court adjourned for the day, and Dr. Heynen assured the trial court that she would be available to consult with appellant's counsel.

The next morning counsel took Dr. Heynen on cross-examination. She agreed that appellant's records from his stay at Vernon State Hospital "weigh several pounds." Out of the presence of the jury appellant then renewed his motion for expert assistance to help him interpret those voluminous records with a view to cross-examining Dr. Heynen. Once again the trial court asked counsel:

> ". . . Do you want to talk with [Dr. Heynen] some more if you have problems, because I think the lady would be happy to go over all this with you.
>
> [DEFENSE COUNSEL]: Your Honor, my greatest need is to be able to impeach her testimony and to discredit it, and of course, she's not available for that. That's what I need for cross examination, so I see no benefit in talking to her.
>
> THE COURT: I thought you said you were incompetent and couldn't understand these records.
>
> [DEFENSE COUNSEL]: I am.
>
> THE COURT: I'm offering, if she can help you with any terms or—she said she would stay over yesterday.
>
> [DEFENSE COUNSEL]: My problem is to point out where she's wrong, Your Honor. I don't believe she's available for that."

The trial court again denied the motion.

As cross-examination continued, Dr. Heynen verified that Dr. Martinez had diagnosed appellant as suffering from undifferentiated schizophrenia, organic brain syndrome, and extreme psychosocial stressors. Dr. Heynen admitted that she herself had found that appellant had "diffuse organic brain damage." She believed his earlier history of commitment to mental hospitals, however, was "generally because of drug abuse." Disagreeing with Dr. Martinez'

revaluation of appellant as schizophrenic, Dr. Heynen opined that her own diagnostic skills "far exceed those of Dr. Martinez." She acknowledged that another doctor had earlier found in appellant "the capacity ... to decompensate and to be a danger to himself and others." She pointed out, however, that this doctor did not "give any reason why he thought he had decompensated." On redirect examination Dr. Heynen noted several typical characteristics of schizophrenia (e.g., incoherence, impaired personal hygiene, "flat affect") that appellant did not manifest.

During final argument appellant's counsel conceded that the evidence showed appellant caused the death of Rodriguez. Emphasizing appellant's history of mental health commitments and his apparently delusional belief that Rodriguez' family intended to sell his baby, counsel argued that the jury should find that when appellant killed Rodriguez, he did not appreciate the wrongfulness of his conduct. In rebuttal, the State stressed Dr. Heynen's testimony that appellant could distinguish right from wrong when he committed the offense. After deliberating for five hours, the jury returned a guilty verdict.

The court of appeals held that failure of the trial court to grant appellant's persistent motions to appoint an independent psychiatric expert to assist him was not error. The reasoning of the court of appeals was threefold, as we understand it. First, the court of appeals observed that the trial court had appointed "disinterested experts" in accordance with Article 46.03, supra, which statutory scheme has been found by the United States Fifth Circuit Court of Appeals to satisfy constitutional requirements of *Ake v. Oklahoma*, supra.[1] See *Granviel v. Lynaugh*, 881 F.2d 185, at 191-92 (CA5 1989), *cert. denied*, 495 U.S. 963, 110 S.Ct. 2577, 109 L.Ed.2d 758 (1990). Second, the court of appeals believed that by his "admirable" cross-examination of Dr. Heynen, counsel for appellant succeeded in impeaching her without the benefit of expert assistance. *De Freece v. State*, supra, at 255. Finally, the court of appeals faulted appellant for not subpoenaing Dr. Martinez, thereby obtaining what would likely have been favorable testimony without putting the trial court to the necessity of appointing an additional expert. *Id.*, at 256. We will address each of these reasons in turn.

II.

In treating the court of appeals' first reason for rejecting appellant's *Ake* claim, we confront the question whether examination by "disinterested experts" at Vernon State Hospital, pursuant to Article 46.03, § 3(a), supra, and testimony from at least one of those experts at trial about conclusions she drew from that examination, were sufficient to meet the due process minimum announced in *Ake*. Appellant does not claim he was deprived of the opportunity to be examined by a competent expert on the question of sanity, as was Ake. He does claim, however, that, having shown his sanity would be a significant factor at his trial, he should have been provided an expert of the court's choosing to help him evaluate and prepare his sanity defense, and meaningfully confront expert testimony adduced by the State. We agree, and hold that the trial court erred in denying him that assistance.

Our analysis begins with a brief overview of Article 46.03, § 3(a), supra, and the Fifth Circuit's conclusion in *Granviel v. Lynaugh*, supra, that the neutral "court's expert" it provides is sufficient to comply with *Ake*. Next we review the decision in *Ake* itself, followed by an examination of what other jurisdictions have held regarding the scope of psychiatric assistance that *Ake* requires. Finally we explain our own understanding of the scope of psychiatric assistance under *Ake*, and apply that understanding to the facts of the instant case.

1. Of course, *Ake v. Oklahoma* was decided as a matter of federal due process. That the statutory scheme meets constitutional muster under *Ake* would not seem an adequate response to appellant's claims that he was also denied equal protection, effective assistance of counsel and compulsory process.

Article 46.03

Before 1967 there was no express authority in Texas for appointing an expert to examine a criminal accused to determine either competency to stand trial or sanity at the time of the offense. For that reason this Court held that trial courts did not abuse their discretion in failing to do so. *Ellzey v. State*, 158 Tex.Cr.R. 604, 259 S.W.2d 211 (1953); *Crain v. State*, 394 S.W.2d 165 (Tex.Cr.App.1964). Nor did this Court perceive that the federal constitution required even so much as a state-sponsored examination for sanity, much less an expert for the express purpose of assisting the defense. *Crain v. State*, supra; *Bush v. State*, 172 Tex.Cr.R. 54, 353 S.W.2d 855 (1962), citing *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 73 S.Ct. 391, 97 L.Ed. 549 (1953).[2] By way of amendment to Article 46.02, supra, adding § 2(f)(1), the Legislature provided for the first time in 1967 that:

> "[t]he court may, at its discretion appoint disinterested qualified experts to examine the defendant with regard to his present competency to stand trial and to his sanity, and to testify thereto at any trial or hearing in connection to the accusation against the accused."

Acts 1967, 60th Leg., ch. 659, p. 1750, § 33, eff. August 28, 1967. In 1975 the Legislature enacted Article 46.03, supra, and placed the provision governing appointment of experts to determine sanity there, apart from provisions relating to competency to stand trial, which remained in Article 46.02, supra. See Acts 1975, 64th Leg., ch. 415, p. 1095, eff. June 19, 1975.

As of the time of trial in this cause, § 3(a) of Article 46.03, supra, read:

> "If notice of intention to raise the insanity defense is filed under Section 2 of this article, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health and mental retardation to examine the defendant with regard to the insanity defense and to testify thereto at any trial or hearing on the issue."

Under § 3(d) of Article 46.03, then as now, the appointed expert or experts must submit a written report to the trial court within thirty days detailing their "observations and findings pertaining to the insanity defense." The trial court is required to furnish a copy of the report to both the State and the defendant. Accordingly, we have characterized experts under these provisions as "not appointed by the court as the expert of the State or the defense, but [as] the court's disinterested witness." *Granviel v. State*, 552 S.W.2d 107, at 115 (Tex.Cr.App.1976). However, § 3(f) of Article 46.03, supra, requires the trial court to provide "a reasonable opportunity" for the accused "to be examined by a psychiatrist or other expert of his own choice[.]" While § 3(f) does not speak to the question whether, if the accused cannot afford an expert "of his own choice," one must be provided for him, we have indicated that counsel may obtain an expert to examine his indigent client by operation of Article 26.05, V.A.C.C.P. *Von Byrd v. State*, 569 S.W.2d 883, at 896 (Tex.Cr.App.1978).[3]

In *Granviel v. Lynaugh*, supra, the petitioner challenged the constitutionality of the Texas statutory scheme under *Ake v.*

2. Bush ultimately obtained relief in a federal habeas corpus petition, *Bush v. McCollum*, 231 F.Supp. 560 (N.D.Texas 1964), *aff'd*, 344 F.2d 672 (CA5 1965), but not before the cause on original appeal was remanded once by the United States Supreme Court, *Bush v. Texas*, 372 U.S. 586, 83 S.Ct. 922, 9 L.Ed.2d 958 (1963), and his claim once again rejected by this Court in *Bush v. State*, 372 S.W.2d 683 (Tex.Cr.App.1963).

3. But failure of the trial court to appoint a psychiatric expert is subject to the same abuse of discretion standard by which we measure any other failure to appoint an expert under Article 26.05, supra. *Stoker v. State*, 788 S.W.2d 1, at 16–17 (Tex.Cr.App.1990); *Hammett v. State*, 578 S.W.2d 699, at 705–707 (Tex.Cr.App.1979). And presumably counsel must have already "incurred" the expense of an independent examination of his client "with prior court approval" before Article 26.05 authorizes compensation. Cf. *Myre v. State*, 545 S.W.2d 820, at 826 (Tex.Cr.App.1977) (under former incarnation of Article 26.05, supra, defendant must show he "incurred" expense before he can be compensated); *Eggleston v. State*, 422 S.W.2d 460, at 463–64 (Tex.Cr.App.1968) (same).

Oklahoma, supra. The trial court had appointed a "disinterested expert" as per the statute to examine Granviel prior to trial, but refused to appoint another psychiatric expert at Granviel's request whose report would be unavailable to the State. The Fifth Circuit denied relief, holding that the Texas procedure was sufficient to comply with *Ake*, essentially because it believed that "[a]vailability of a neutral expert provides defendants with 'the raw materials integral to the building of an effective defense.'" 881 F.2d at 192, quoting *Ake v. Oklahoma*, 470 U.S. at 77, 105 S.Ct. at 1093, 84 L.Ed.2d at 62. We do not think careful consideration of *Ake*, with its emphasis on due process in the context of an adversarial system, bears this view out.

Ake v. Oklahoma

Accused of capital murder, Glen Burton Ake displayed such odd behavior at his arraignment that the trial court ordered an examination to decide whether he should be observed to determine his competency to stand trial. The psychiatrist who examined Ake concluded he was a paranoid schizophrenic, and he was committed to a state hospital, where he was found incompetent. Six weeks later he was found to have regained competency, subject to continued treatment with an antipsychotic drug, Thorazine. Prior to trial his attorney indicated he would raise the defense of insanity, and requested psychiatric assistance, since Ake was indigent. Even though the state hospital had made no determination of Ake's sanity at the time of the offense, the trial court denied his request. "*As a result there was no expert testimony for either side on Ake's sanity at the time of the offense.*" *Ake v. Oklahoma*, 470 U.S. at 72, 105 S.Ct. at 1091, 84 L.Ed.2d at 59.[4] The Oklahoma Court of Criminal Appeals affirmed Ake's conviction, holding that the State had no obligation to provide psychiatric services to indigents in capital cases.

The United States Supreme Court reversed Ake's conviction. In its opinion the Court began by reaffirming the principle that due process requires that the indigent accused in a criminal trial must be equipped with the "basic tools" to ensure "a proper functioning of the adversary process[.]" *Id.*, 470 U.S. at 77, 105 S.Ct. at 1093, 84 L.Ed.2d at 62. Deciding whether a psychiatric expert was necessary to that end, the Court considered three factors borrowed from cases involving questions of procedural due process, *viz.*:

> "The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided."

Id. The accused's interest in maintaining the institutional presumption of innocence, the Court observed, "is obvious." The State, on the other hand, has more than the ordinary adversarial interest in prevailing; it has a concomitant interest in the fairness of the proceeding and the accuracy of the result. Moreover, because most states already provide some level of psychiatric assistance to the accused, that burden cannot be prohibitive. In these lights the Court concluded that the State's interest "is not substantial[.]" *Id.*, 470 U.S. at 79, 105 S.Ct. at 1094, 84 L.Ed.2d at 63–64.

Assessing the third factor, the Court began "by considering the pivotal role that psychiatry has come to play in criminal proceedings." *Id.*

> "In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge and jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychia-

4. Emphasis in the original. All other emphasis supplied unless otherwise indicated.

trists and how to interpret their answers."

Id., 470 U.S. at 80, 105 S.Ct. at 1095, 84 L.Ed.2d at 64. Thus, psychiatric experts may assist lay judges and jurors to make an informed decision about the sanity of the accused at the time of the offense. Because psychiatry is not "an exact science," however, juries remain the "primary factfinders," and, the Court suggested, it is important that the jury hear "the psychiatrists for each party" to equip it to make as informed a decision as possible. *Id.*, 470 U.S. at 81, 105 S.Ct. at 1095, 84 L.Ed.2d at 65. To avoid the risk of an inaccurate verdict, the Court concluded, an indigent accused must be provided an expert "to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses[.]" *Id.*, 470 U.S. at 82, 105 S.Ct. at 1096, 84 L.Ed.2d at 65.

The Court concluded:

> "We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. That is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right."

Id., 470 U.S. at 83, 105 S.Ct. at 1096, 84 L.Ed.2d at 66.[5]

Persuasive Authority

Commentators have noted an "ambiguity" in *Ake*, a seeming internal contradiction between the express right to a single competent psychiatric expert not of the accused's choosing, on the one hand, and indications throughout the opinion, on the other, that the accused is entitled to an expert who will participate with him as a partisan in the case. E.g., Note, Due Process and Psychiatric Assistance: Ake v. Oklahoma, 21 Tulsa L.J. 121, at 143–46 (1985); Note, Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma, 84 Mich.L.Rev. 1326, at 1345–57 (1986). Some courts have targeted the first aspect of *Ake* to hold that a single "neutral" expert is all the State need supply to ensure proper adversarial functioning. Thus, many courts have denied *Ake* claims where the accused has received an examination in a state mental institution pursuant to court order, holding that the state-sponsored examination met all due process requirements. E.g., *Beard v. State*, 306 Ark. 546, 816 S.W.2d 860 (Ark.1991); *State v. Hoopii*, 68 Haw. 246, 710 P.2d 1193 (1985); *Djadi v. State*, 72 Md.App. 223, 528 A.2d 502 (1987); *Willie v. State*, 585 So.2d 660 (Miss.1991); *State v. Hix*, 38 Ohio St.3d 129, 527 N.E.2d 784 (1988); *State v. Indvik*, 382 N.W.2d 623 (N.D.1986). In each of these cases, however, the state institution had found no reason to doubt the defendant's sanity, and therefore the court also found the defendant had not shown insanity would be a significant factor at trial in any event. Many other courts have held similarly that, where a state-sponsored examination reveals no likelihood of insanity at the time of the offense, a defendant has not met the threshold requirements for relief under *Ake*. E.g., *Simmons v. Commonwealth*, 746 S.W.2d 393 (Ky.1988); *State v. Barrett*, 577 A.2d 1167 (Me.1990); *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990); *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838 (1985); *State v. Newcomer*, 48 Wash.App. 83, 737 P.2d 1285 (1987); *Glass v. Blackburn*, 791 F.2d 1165 (CA5 1986); *United States v. Fazzini*, 871 F.2d 635 (CA7 1989); *Cart-*

5. This Court does not understand the holding of *Ake* to be limited to the context of capital offenses. See *McBride v. State*, 838 S.W.2d 248 (Tex.Cr.App.1992).

Wright v. Maynard, 802 F.2d 1203 (CA10 1986); *Bowden v. Kemp*, 767 F.2d 761 (CA11 1985). Every court that has found the defendant did make an adequate showing that insanity would be a significant factor, however, has also held that *Ake* entitled him to more than an examination and testimony, if favorable, from a neutral psychiatric expert—every court, that is, except the Fifth Circuit in *Granviel v. Lynaugh*, supra.

In *Lindsey v. State*, 254 Ga. 444, 330 S.E.2d 563 (Ga.1985), evidence that the defendant had a history of mental problems, and had been diagnosed as a paranoid schizophrenic and prescribed anti-psychotic medications, was held sufficient to show his sanity at the time of the offense would be a significant factor at trial. The Supreme Court of Georgia therefore reversed the conviction on authority of *Ake*. Responding to the State's contention that access to and the opportunity to confer with a neutral expert would be enough to satisfy *Ake*, the court concluded that "in addition to examining the defendant, the psychiatrist must assist the defense by aiding defense counsel in the cross-examination and rebuttal of the state's medical experts." *Id.*, 330 S.E.2d at 567. See also *Holloway v. State*, 257 Ga. 620, 361 S.E.2d 794 (Ga. 1987).

In *Palmer v. Indiana*, 486 N.E.2d 477 (Ind.1985), the Supreme Court of Indiana examined its statutory scheme for providing expert examination for insanity claimants. Under Indiana law, upon notice of an insanity defense, the trial court is automatically to appoint at least two medical experts, one of whom must be a psychiatrist, to examine the defendant. The court recognized that one requirement of *Ake* is that defense counsel be provided with an expert with whom to consult "about the validity of observations being made by other witnesses." *Id.*, at 482. Accordingly, the court directed that its statutory scheme be implemented with the understanding that the appointed psychiatrist "be available for consultation with counsel during preparation for trial." *Id.*

The defendant in *State v. Gambrell*, 318 N.C. 249, 347 S.E.2d 390 (1986), was found to be in need of psychiatric care, and was committed to a state hospital for determination of his capacity to stand trial. The examining psychiatrist's initial impression was that the defendant was "probably schizophrenic," and he was medicated with psychotropic drugs. Ultimately the psychiatrist found him both competent and sane. Nevertheless, in view of the initial skepticism about Gambrell's mental condition, along with some indication of mental illness in his family history, the Supreme Court of North Carolina concluded he had shown that his sanity would be a significant factor at trial. Holding that a state-sponsored psychiatric expert was acceptable under *Ake*, the court reversed the conviction nevertheless because the defendant had obtained only an examination by the state psychiatrist, but had received no aid in "evaluating, preparing, and presenting his defense at both the guilt and sentencing phases." *Id.*, 347 S.E.2d at 395.

The federal courts of appeals have also been inclined to hold that defendants who meet the threshold showing of *Ake* are entitled to more than a "neutral" testifying expert. *Smith v. McCormick*, 914 F.2d 1153, at 1158–59 (CA9 1990). In *United States v. Sloan*, 776 F.2d 926 (CA10 1985), the trial court appointed a psychiatrist to report to the court after an examination to determine competency and sanity of the defendant. The examiner reported that Sloan "suffered from a borderline schizoid personality," but that he was both competent and sane. Sloan requested a defense psychiatrist to help him understand the examining psychiatrist's report and to prepare to cross-examine him at trial, which was denied. The Court of Appeals reversed the conviction, holding that without the aid the defendant had requested, he was deprived of due process. Along the way the Court of Appeals observed, "The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution." *Id.*, at 929. See also *United States v. Crews*, 781 F.2d 826

(CA10 1986); *Liles v. Saffle*, 945 F.2d 333 (CA10 1991).

In *Cowley v. Stricklin*, 929 F.2d 640 (CA11 1991), the state trial judge had committed the defendant to mental institutions on three occasions before he was prosecuted for sexual assault. An earlier diagnosis found he suffered from schizophrenia, but at the state mental health facility he was found competent to stand trial and mentally responsible for the offense. The court refused Cowley's request for an appointed expert, despite representations from a psychologist who had volunteered his services and examined Cowley briefly, that he was still schizophrenic. On federal habeas corpus, Alabama argued that because the defendant had had access to the reports of the state psychiatrist, and help from the volunteer psychologist, there was no *Ake* violation. The Court of Appeals rejected these contentions, observing that the state's psychiatrist "did not assist in Cowley's trial preparation and obviously could not have assisted Cowley in his own cross-examination." *Id.*, at 644. Moreover, the psychologist had not interviewed Cowley in any depth in ten years, and had not been able to form an opinion as to his sanity at the time of the offense. Cowley's conviction was reversed and remanded to the state court for retrial or release. See also *Buttrum v. Black*, 721 F.Supp. 1268 (N.D.Ga.1989), *aff'd*, 908 F.2d 695 (CA11 1990).

Thus, it is true that some jurisdictions have said, essentially in dicta, that the statutory provision of a single neutral psychiatrist to service both parties and the court is sufficient to meet the due process minimum of *Ake*.[6] However, it appears that, *Granviel v. Lynaugh*, supra, notwithstanding, the greater weight of authority holds otherwise. And, in our view, with good reason.

Ake and Article 46.03

Ours is an adversarial system of criminal justice, not an inquisitorial one. Either mode of inquiry is aimed at assessing the truth. However, the adversarial model rests on the assumption that each party to a dispute, motivated by self-interest, will develop his position to the greatest extent possible within the boundaries of the rules of evidence and procedure, thus providing the factfinder an optimal vantage from which to gauge all relevant facts and make an informed decision on the merits. In *Ake* the Supreme Court reiterated that where the defendant is indigent, due process requires that the State guarantee he be at least minimally equipped to participate meaningfully in this adversarial process.

Where sanity of the indigent accused will be a significant factor at trial, psychiatry has come to play a "pivotal role." 470 U.S. at 79, 105 S.Ct. at 1094, 84 L.Ed.2d at 64. But since psychiatry "is not ... an exact science," equally competent practitioners confronted with the same raw data often disagree in their diagnoses in an area that is "inevitably complex and foreign" to lawyers and juries alike. 470 U.S. at 81, 105 S.Ct. at 1095, 84 L.Ed.2d at 64–65. Although psychiatric testimony is undoubtedly useful in the resolution of many issues in the adversary trial context, including sanity at the time of the offense:

> "[n]one of these issues ... can be addressed by a psychiatrist with absolute certainty. Thus, to expect the 'objective' opinion of an amicus expert to yield 'the answer' in a particular case is unrealistic. Unless the choices made by the psychiatrist in the establishment and proof of

6. The State argues that denial of petition for writ of certiorari in *Granviel v. Lynaugh*, supra, 495 U.S. 963, 110 S.Ct. 2577, 109 L.Ed.2d 758 (1990), shows that the Supreme Court endorses the view that examination by a neutral psychiatrist satisfies *Ake*. But the denial of a petition for writ of certiorari has no more precedential value than does the refusal of a petition for discretionary review in this Court. E.g., *Hopfmann v. Connolly*, 471 U.S. 459, 105 S.Ct. 2106, 85 L.Ed.2d 469 (1985). Nor do two other cases cited by the State in which petitions for writ of certiorari were denied, *viz: Glass v. Blackburn*, 791 F.2d 1165 (CA5 1986), *cert. den.*, 481 U.S. 1042, 107 S.Ct. 1985, 95 L.Ed.2d 824 (1987), and *State v. Vickers*, 159 Ariz. 532, 768 P.2d 1177 (1989), *cert. den.*, 497 U.S. 1033, 110 S.Ct. 3298, 111 L.Ed.2d 806 (1990), even stand for the proposition, as we understand them, that examination by a neutral psychiatrist is all that due process requires.

his or her hypothesis are open to informed scrutiny, the psychiatrist's conclusions are of limited value. And, unless each party has access to psychiatric assistance in preparing and directing this scrutiny, it cannot be expected that the scrutiny will be adequately informed. Indeed, each party must have the opportunity to explore and explain the relevant psychiatric data in a case if the conclusions drawn from these data are properly to be understood by the judge or the jury and the 'truth' is to be most closely approximated. This is the teaching of *Ake v. Oklahoma*."

Showalter & Fitch, Objectivity and Advocacy in Forensic Psychiatry After Ake v. Oklahoma, 15 J. Psychiatry & L., 177, at 186 (1987). Because psychiatric evidence is at once esoteric and uncertain, the indigent accused needs a psychiatrist, *inter alia*, "to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witness," if he is to present the factfinder with a perspective broad enough to ensure an informed resolution of the sanity question. 470 U.S. at 82, 105 S.Ct. at 1096, 84 L.Ed.2d at 65. Otherwise the risk of error is intolerably high, and due process will be offended.

In *Granviel v. State*, supra, at 115, we called the "disinterested experts" contemplated by former Article 46.02, § 2(f)(1), now Articles 46.02, § 3(a) & 46.03, § 3(a), "the court's ... experts." See also *Von Byrd v. State*, supra, at 896. We reject the notion that a "court's expert" necessarily fulfills the role of psychiatric assistant to the indigent accused envisioned by *Ake*. Such a "court's expert" may well serve an important function in identifying whether sanity will be a significant factor at trial. But in an adversarial trial itself, judge and jury necessarily play a passive, neutral role. In that context the phrase "court's expert" is an oxymoron. It is the parties, not the judge, who supply evidence from which the jury is to distill the truth. And while it is true, as the Fifth Circuit echoes in *Granviel v. Lynaugh*, supra, at 191, that "[a] psychiatrist's examination is not an adversary proceeding[,]" the trial at which the State adduces evidence of that examination most certainly is.

[1] In an adversarial system due process requires at least a reasonably level playing field at trial. In the present context that means more than just an examination by a "neutral" psychiatrist. It also means the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts. We recognize that the accused is not entitled to a psychiatrist of his choice, or even to one who believes the accused was insane at the time of the offense. *Ake* makes this much clear. But even a psychiatrist who ultimately believes the accused was sane can prove invaluable by pointing out contrary indicators and exposing flaws in the diagnoses of State's witnesses.

None of this is to say that Article 46.02, § 3(a), supra, is unconstitutional. As in other jurisdictions, a preliminary examination by "disinterested experts" under this provision may show insanity is not to be a significant factor in the case. In that event the due process right articulated in *Ake* would not be triggered. Where that examination shows a viable insanity claim, however, due process does not end there. The accused must be given the means to advance that claim at trial. Thus, more than the appointment of "disinterested experts" under Article 46.03, supra, is required. Once it is shown that insanity will be a significant factor at trial, the trial court abuses its discretion in failing to appoint, or to give "prior ... approval" to "reasonable expenses incurred" by counsel for the accused to obtain, a competent psychiatrist to assist in the evaluation, preparation and presentation of his insanity defense. Article 26.05(a), supra.

Application of Ake

[2] The State does not contest that in this cause appellant demonstrated to the

trial court that insanity would be a significant factor at trial, as indeed it turned out to be. The facts of the offense itself are fairly bizarre, as the trial court would have been aware at least by the time he denied appellant's latest request for expert assistance. The State itself questioned both his sanity and his competency to stand trial, and he was indeed found to be incompetent. He did not attain competency for another eight months, and then, only subject to continued medication. While the only opinion expressed prior to trial as to his sanity at the time of the offense, from the clinical psychologist, Dr. Heynen, is that he was sane, the treating psychiatrist, Dr. Martinez, believed him to be schizophrenic. He had a significant history of commitment in mental health facilities. These facts conduce to show, no less than those in *Ake*, 470 U.S. at 86, 105 S.Ct. at 1098, 84 L.Ed.2d at 68, that insanity was not only a significant factor at trial, it was the only contested issue. See also, e.g., *Gambrell v. State*, supra; *United States v. Sloan*, supra; *Cowley v. Stricklin*, supra. And in fact counsel conceded in final argument that his client caused the death of Rodriguez, arguing only that he had not perceived his conduct to be wrong.

Counsel for appellant did not ask for anything more than he was minimally entitled to under *Ake*. He did not request a particular psychiatrist, but only a single competent one. Nor did he seek a psychiatrist who would necessarily testify that his client was insane at the time of the offense. He simply sought expert guidance in evaluating the strength of appellant's defense, presenting it in the best possible light to the jury, and, in particular, in scrutinizing the testimony of Dr. Heynen, the only expert opinion then available that directly addressed the question of appellant's ability to distinguish right from wrong. Even a neutral "court's expert" cannot effectively prepare counsel to cross-examine herself. *Cowley v. Stricklin* supra; *Buttrum v. Black*, supra. We hold that the trial court erred in denying appellant's request for the appointment of a psychiatrist to aid in the preparation and presentation of his insanity defense.

III.

[3] The court of appeals believed counsel was able to conduct an "admirable" cross-examination of Heynen without the benefit of psychiatric assistance. As appellant notes, this smacks of a harmless error analysis. But in *Ake* itself the Supreme Court reversed the conviction and remanded the cause for new trial without conducting a harm analysis. See *Vickers v. Arizona*, 497 U.S. 1033, at 1036, 110 S.Ct. 3298, at 3300, 111 L.Ed.2d 806, at 809 (1990) (Marshall, J., dissenting to denial of petition for writ of certiorari). In any event, we would not conclude that the error in failing to appoint a psychiatrist to consult with counsel was harmless error in this cause. First, help in preparing to cross-examine State's witnesses is not the only function of an appointed psychiatrist contemplated by *Ake*. Even if it were, that counsel did an "admirable" job in cross-examining Heynen does not mean he could not have done an even more effective job with the aid of an expert to interpret the voluminous data from Vernon State Hospital from which her opinion was derived. Especially considering that, although the only contested issue at trial was sanity, the jury nevertheless deliberated for five hours before convicting appellant, we could not say beyond a reasonable doubt that the failure to appoint the requested expert did not contribute to the verdict in this cause.

IV.

[4] Finally, the court of appeals believed appellant could have obtained all the succor to which he was constitutionally entitled by subpoenaing Dr. Martinez to testify at trial. We disagree. To begin with, once it is shown that insanity will be a significant factor at trial, more than just favorable psychiatric testimony—if that is even available—is required to fully satisfy *Ake*.[7] Martinez was not present to help

7. Again, we do not suggest that *Ake* guarantees appointment of an expert who will testify that the accused is insane. But once it is shown that insanity will be a significant factor at trial,

counsel interpret the hospital records or critically examine Heynen's conclusions for purposes of cross-examining her (even had he been inclined to do so, considering that they were colleagues). For counsel to have elicited an opinion from Martinez before trial, without first obtaining his appointment or the provision of funds to hire him as a *defense* expert, would have risked generating another witness for the State, should Martinez' ultimate opinion on the issue of insanity prove to be unfavorable.[8] That Martinez believed appellant to be a schizophrenic was already before the jury. We cannot agree that counsel's failure to risk calling Martinez to the witness stand should operate to nullify his right under *Ake* to the aid and consultation of a psychiatric expert. See *Cowley v. Stricklin*, supra, at 644–45; *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648, at 653–54 (1988).

V.

We therefore reverse the judgment of the court of appeals and remand the cause for new trial.[9]

McCORMICK, P.J., concurs in the result.

WHITE, J., dissents.

appellant is entitled to the appointment of a psychiatric expert. If the appointed psychiatrist believes the accused was insane, he may certainly so testify. But even if he does not, he must be made available to consult with counsel, to interpret records, to prepare counsel to cross-examine State's witnesses, and generally to help present appellant's defense in the best light.

8. Until such time as Martinez may be appointed by the court as a *defense* expert, he would remain, under Article 46.03, supra, a "court's expert," and as such, not subject to the attorney-client privilege. *Granviel v. State*, supra, at 115. But had the trial court appointed him as a defense expert, Martinez would have been a "representative of the lawyer," i.e., "one employed by the lawyer to assist the lawyer in the rendition of professional legal services[.]" Tex.R.Cr.Evid., Rule 503(a)(4). As such he could be prevented "from disclosing any . . . fact which came to [his] knowledge . . . by reason of the attorney client relationship." Tex.R.Cr.Evid., Rule 503(b).

9. In view of this disposition, we need not address other matters in the court of appeals' opinion. See n. 1, *ante*.

James Montgomery IKNER, Appellant,

v.

The STATE of Texas, Appellee.

Nos. 007–93, 008–93.

Court of Criminal Appeals of Texas, En Banc.

March 3, 1993.

Discretionary Review Refused March 3, 1993.

Defendant was convicted in the County Criminal Court at Law No. 10, Harris County, Sherman Ross, J., of resisting arrest and driving while intoxicated. Petition for review was granted. The Court of Appeals, 848 S.W.2d 162 reversed. State petitioned for discretionary review. The Court of Criminal Appeals, Baird, J., held that Court of Appeals erred by not addressing state's argument that defendant had not preserved error for appellate review.

Vacated and remanded.

Criminal Law ⇐1028

Court of Appeals erred by not addressing state's argument that defendant, who was charged with resisting arrest and driving while intoxicated, had not preserved error for appellate review.

Allen C. Isbell, on appeal only, Houston, for appellant.

John B. Holmes, Jr., Dist. Atty., Dan McCrory and D. Craig Hughes, Asst. Dist. Attys., Houston, Robert Huttash, State's Atty., Austin, for the State.

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Washington, D.C. 20543

Re: Respondent's Brief In Opposition, State of Texas vs. Harold Lindsay Defreece, No. 92-1882

Dear Mr. Suter:

Enclosed please find:

(1) An original and twelve copies of Respondent's Brief In Opposition;

(2) An original and twelve copies of Motion For Leave To Proceed In Forma Pauperis with Affidavit;

(3) Appearance Form.

I would like these documents filed in the above styled and numbered cause.

Please do not hesitate to contact me if you have any questions.

Sincerely

Mark Stevens

MS/cr

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

NO. 92-1882

THE STATE OF TEXAS VS. HAROLD LINDSAY DEFREECE

The Clerk will enter my appearance as Counsel of Record for Respondent, Harold Lindsay Defreece.

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature: Mark Stevens

Name: Mr. Mark Stevens

Firm: Law Offices of Mark Stevens
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